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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-83

LT. JOHN A. STRAIT,

Petitioner,

—v.—

HON. MELVIN R. LAIRD,
Secretary of Defense, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE PETITIONER

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HON. MELVIN R. LAIRD,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE PETITIONER

Opinions Below

The opinion of the court of appeals announcing the judgment below is reported at 445 F.2d 843 (9th Cir. 1971). The earlier opinion, filed on February 17, 1971 but thereafter vacated, is reported at 3 Selective Service Law Reporter (SSLR) 3784 and is printed in the Single Appendix at pp. 59-70. The opinion of the district court dated June 24, 1970, is reported at 3 SSLR 3152 (N.D. Cal. 1970).

Jurisdiction

The final judgment and opinion below was filed on June 4, 1971. A Petition for Writ of Certiorari was filed on July 15, 1971. Certiorari was granted on November 16, 1971. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Did the district court have jurisdiction under 28 U.S.C. §2241(a) to hear and determine a petition for writ of habeas corpus brought by an Army Reservist who, with the consent of the respondents, resided within the territorial confines of the district, but whose military records were maintained at a nation-wide reserve personnel center located in another state?

2. Does the Mandamus and Venue Act of 1962 provide a method of reviewing, under the basis-in-fact test, military administrative determinations, and does the court of appeals' construction of the scope of review and extraordinary nature of the remedy created therein undermine the intent of Congress expressed in 28 U.S.C. §1361?

3. Did the district court have jurisdiction under other statutes providing for judicial review of federal administrative actions—namely, the Administrative Procedure Act, 5 U.S.C. §§701-704 and the federal question statute, 28 U.S.C. §1331(a)?

Constitutional, Statutory and Regulatory Provisions Involved

The full text of the constitutional, statutory, and regulatory provisions involved herein is set forth in the Appendix to this brief, *infra* at pp. 69-79. The cited provisions are as follows:

Constitution of the United States:

Article I, Section 9 (Habeas Corpus);

Fifth Amendment (Due Process).

Statement of the Case

Petitioner, Lt. John Strait, is an unattached, non-unit Army Reserve Officer not on active duty, seeking review of an administrative action by the Army denying his request for conscientious objector discharge.

Lt. Strait accepted a commission as a reserve officer upon his graduation from the University of California in June, 1966, after having completed the ROTC program (A. 4).* The Army then permitted Lt. Strait to proceed to law school at Yale University in New Haven, Connecticut, and consequently also postponed his active duty obligation for the duration. During this period of deferment, his military records were housed at a nationwide record-keeping center for non-unit Army reservists, the United States Army Reserve Components Center [hereinafter Reserve Center][1] (*Id.*). Lt. Strait was not compensated

[1] Each branch of the Armed Services maintains a similar record-keeping center for reserve personnel who are not assigned to functioning reserve units for training purposes. The Army's reserve

* "A.—" refers to the Single Appendix filed with the Court.

by the Army, nor was he required to attend any training functions, such as unit drills or summer encampments (A. 5). Since birth Lt. Strait maintained his permanent residence in the Northern District of California where he paid local taxes, had his bank account, and was registered for the draft. He temporarily left that domicile only during those months of the school years during which he was in attendance at law school in Connecticut (A. 34). In June 1969, Lt. Strait completed law school and came home in order to take the California bar examination, pursuant to his delay-status agreement with the Army (*Id.*). Accordingly, an active duty reporting date of February 9, 1970 was established (A. 57). Those orders were later amended, at Lt. Strait's request, to allow him to re-take the bar exam, his first effort having been unsuccessful (A. 34, 57). The Army ultimately ordered him to commence his active service at Ft. Gordon, Georgia on April 13, 1970 (A. 57).

Following the acceptance of his commission, Lt. Strait received all his orders from the Army in written communications addressed to him in San Francisco, including orders to take a physical there (A. 34). His active duty orders directed him to proceed from San Francisco to his new active duty station, and travel vouchers were issued to him in San Francisco for that purpose (A. 39, 44).

While in San Francisco, Lt. Strait developed increasingly irreconcilable conflicts of conscience about his active service obligation. When his cousin, a conscientious ob-

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center was located at Ft. Benjamin Harrison, Indiana, when this action commenced, but was recently re-located in St. Louis, Missouri. The Navy's Center is located in Bainbridge, Maryland; the Air Force's in Denver, Colorado. *See*, Brief of The Central Committee for Conscientious Objectors and Reservists Committee to Stop the War, *Amici Curiae* filed herein.

jector, committed suicide in November 1969, Lt. Strait's uncertainties ceased (A. 7). He then resolved to submit an application for discharge from the Army on grounds of conscientious objection, pursuant to Army Regulation 135-25 (*Id.*).

He prepared his application and gathered letters of support in December 1969. He submitted the application to the Reserve Center in Ft. Benjamin Harrison on January 20, 1970 (A. 5). The Army then implemented the provisions of paragraph 7.c. of AR 135-25 which provides that "[a]rea commanders will provide assistance upon request from the . . . Reserve Components Personnel Center . . . to arrange for necessary interviews of non-unit reservists residing in their geographical area of jurisdiction" (A. 18). Pursuant to this provision Lt. Strait was directed by subordinates of Lt. Gen. Stanley Larsen, the United States Sixth Army Area Commander, a respondent herein, to appear for the required interviews and hearings at Ft. Ord, California, a major Army base located near San Francisco and within the territorial limits of the Northern District of California (*Id.*).

Between February 18 and 20, 1970, interviews and hearings were held at Ft. Ord. Lt. Strait was counseled as to his legal rights (A. 20), interviewed by a psychiatrist and a chaplain (A. 22-23) and given an O-3 hearing (A. 24-26). Each of the interviewing officers made findings favorable to Lt. Strait and the O-3 Hearing Officer specifically recommended that his request for discharge be granted[2] (A. 26).

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[2] Under AR 135-25 the principal fact-finder is an officer who presides at a hearing where the applicant appears (with witnesses and counsel, if he so desires). The regulation provides that this officer must have a rank of O-3 or higher; hence, the hearing is

These reports were then sent by the Sixth Army to the Reserve Center in Indiana. The review procedure that occurred there was summarized by the court below in its vacated opinion of February 19, 1971, as follows (A. 65):

> "At Fort Benjamin Harrison appellant's record was first reviewed by a lieutenant colonel, chief of the Delayed Officer Management Division, acting in the capacity of appellant's immediate commander. His report recommended disapproval, citing appellant's political activities and concluding that the chaplain and the hearing officer 'erred or were misled in their determination that [his] beliefs were religious in origin.'
>
> The Review Board then acted and, with three members out of fifteen participating, recommended disapproval for these reasons:
>
> 1. That appellant's beliefs were not truly held.
> 2. That they were not religiously founded but reflected political, sociological and philosophical views and a personal moral code.
> 3. That appellant's objections to war were confined to this particular war."

On April 7, 1970, the Army notified Lt. Strait of its decision[3] by a letter mailed to his home in San Francisco

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commonly referred to as the "O-3 hearing" and will be here. AR 135-25, para. 7.b.(3). The Chaplain and psychiatrist are not permitted to make recommendations on the conscientious objector claim. AR 135-25, para. 7.b. Their function is limited to making factual findings within their areas of expertise.

[3] The commanding officer of the Reserve Center is delegated the responsibility for making the final decision on behalf of the Army

(A. 10). He immediately filed a petition for review of this action in the United States District Court for the Northern District of California where he lived and worked (A. 4-17).

The moving papers, filed in the district court on April 9, 1970, were entitled "PETITION FOR WRIT OF HABEAS CORPUS; FOR MANDAMUS; FOR DECLARATORY RELIEF AND MOTION FOR A TEMPORARY RESTRAINING ORDER" (A. 4). In the petition, Lt. Strait requested the court to declare him entitled to a separation from the Army as a conscientious objector, to issue a writ of habeas corpus discharging him from the custody and control of the Army, and to restrain the Army from requiring him to report for active duty (A. 15-16).

The court issued an order to show cause on April 10, 1970, and ordered "that the petitioner remain within the jurisdiction of this Court, that he not be assigned duties inconsistent with the provisions of AR 135-25" (A. 30). The order to show cause was returnable on April 24, 1970, but subsequently the matter was continued by stipulation to June 12, 1970 (A. 2). On the basis of documents which had come into his possession after he filed the original petition, Lt. Strait filed an amended petition on May 11, 1970 (A. 33-38).

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with respect to conscientious objector discharge applications of reservists. The Review Board's function is to prepare findings and to submit them, together with a recommendation, to the commanding officer. AR 135-25, para. 7.h. In this case the review board's findings were apparently prepared on April 3, 1970, and approved and accepted by the commander on April 7, 1970 (A. 40, 42). Lt. Strait, however, was not formed of, nor offered an opportunity to rebut these findings before final action was taken thereon; nor was he informed of the adverse comments of the Chief of the Delayed Officer Management Division of the Reserve Center which were considered and largely adopted by the Review Board (A. 41-42).

On June 11, 1970, respondents filed a return on the show cause order and a motion to dismiss, alleging that the court lacked jurisdiction because Lt. Strait was not assigned to a unit within the district (A. 51-52). The motion to dismiss was argued on June 12, 1970, and on June 26, 1970, the court denied the motion in a memorandum opinion, holding that it had jurisdiction to adjudicate the substantive issues (A. 52-53).

Thereafter, on July 22, 1970 the respondents filed a return and answer (A. 54-57), and the matter was argued on the merits on July 24, 1970 (A. 2). On July 28, 1970 by minute order, the district court denied relief, ruling against Lt. Strait on the merits of his conscientious objector claim (A. 58).

The petitioner then appealed to the Court of Appeals for the Ninth Circuit (A. 2), and the respondents filed a cross-appeal directed to the district court's jurisdictional holding (A. 3). On February 17, 1971 the court of appeals entered its opinion (A. 59-70). First, agreeing with the district court, it held that there was jurisdiction under the habeas corpus statute to hear the petitioner's claims (A. 61-64), 3 SSLR at 3785. The court of appeals then proceeded to a consideration of the merits and concluded that there was no basis in fact for denying Lt. Strait's conscientious objector discharge application. Accordingly it reversed the judgment of the district court and granted the writ (A. 68).

On March 23, 1971 this Court decided *Schlanger* v. *Seamans,* 401 U.S. 487 (1971), and the respondents herein filed a petition for rehearing on the basis of *Schlanger*. The court of appeals requested a response from Lt. Strait who argued that *Schlanger* was distinguishable. In addition,

he briefly mentioned other jurisdictional statutes which had been pleaded in but not reached by the District Court and requested the opportunity to further brief and argue those alternate jurisdictional theories in the event the Ninth Circuit decided to apply *Schlanger*. On June 4, 1971, the court of appeals, without allowing additional briefing or argument, entered a new judgment and opinion ordering the action dismissed (A. 71-74). It held (1) that Lt. Strait's only remedy to challenge the denial of his discharge application was by way of habeas corpus, explicitly rejecting the availability of mandamus jurisdiction pursuant to 28 U.S.C. Section 1361 and (2) that since the petitioner's "custodian"—the commander of the Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana—was physically outside the jurisdiction of the District Court, habeas corpus jurisdiction was not complete (A. 73). The court ignored the Administrative Procedure Act and federal question jurisdictional issues.

Summary of Argument

I.

Lt. Strait, an inactive, non-unit-assigned, Army Reservist, petitioned the United States District Court for the Northern District of California for review of a decision of the Army denying his request for conscientious objector discharge. Lt. Strait invoked the jurisdiction of the district court pursuant to the powers of judicial review provided by the habeas corpus, mandamus, and federal question statutes, 28 U.S.C. §§2241, 1361, and 1331, as well as the Administrative Procedure Act, 5 U.S.C. §§701-704. The court of appeals held that the absence of the petitioner's nominal custodian (the commander of a nationwide record-keeping

center) from the district deprived the district court of jurisdiction to entertain the petition in habeas corpus, and it refused to entertain seriously the other jurisdictional bases pleaded. That decision was in error.

A petition for habeas corpus is the traditional vehicle for seeking judicial review of the military's refusal to grant such discharges, e.g., *Negre* v. *Larsen,* 401 U.S. 437 (1971) and because of the potential restraints which can be imposed the remedy is available to reservists as well as those on active duty. *Hammond* v. *Lenfest,* 398 F.2d 705 (2d Cir. 1968). In the case of inactive duty reservists, those restraints are felt where the reservist resides, and that District has jurisdiction to entertain the petition as the Second Circuit has specifically held. *Arlen* v. *Laird,* —— F.2d ——, 4 SSLR 3692 (2d Cir. 1971).

This Court's decision in *Schlanger* v. *Seamans,* 401 U.S. 487 (1971) does not require a contrary result, as the Ninth Circuit believed. Many factors distinguish the two cases. *Schlanger* involved an active duty Air Force member assigned to a functioning unit in Georgia on temporary leave in Arizona where he filed his petition. Lt. Strait, like thousands of other such reservists, has never been on active duty, is assigned to no functioning military unit, and has never been physicially present at Fort Benjamin Harrison, Indiana, where the Army Reserve Components Personnel Center was located. Nor will he ever be located in St. Louis, Missouri, where the Reserve Center is now located and where Lt. Strait's nominal commander can be found. He was a legal resident of the Northern District of California and resided there with the Army's permission. Indeed, all the hearings and interviews in connection with his discharge application were held there.

The holding below also departs from the background of case law and statutory interpretation against which *Schlanger* was decided. Decisions of this Court which have involved the issue of the territorial limits of the Great Writ concerned the problem of transporting petitioners to remote districts. See, *e.g., Ahrens* v. *Clark,* 335 U.S. 188 (1948). More recently, the lower federal courts, in dealing with novel multi-state jurisdictional issues in the habeas corpus context, have given the statute a flexible reading and have interpreted those earlier decisions such as *Ahrens* v. *Clark, supra,* as accordingly being based primarily on venue considerations. *E.g., Word* v. *North Carolina,* 406 F.2d 352 (4th Cir. 1969); *United States ex rel. Meadows* v. *New York,* 426 F.2d 1176 (2d Cir. 1970).

These decisions point the way to a rule herein that is consistent with *Schlanger,* a case which involved the personal jurisdiction problem created by the total absence of any custodian, vicariously or otherwise, in the district where the petition was filed. Criteria can be developed to determine whether, as here, the restraint is substantially related to the district and whether the nominal custodian was jurisdictionally "present" in the district. See, *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945); *Arlen* v. *Laird,* —— F.2d ——, 4 SSLR 3692, *supra.* Moreover, once these criteria are satisfied, actual service of process may be effected either pursuant to the provisions of 28 U.S.C. §1391(e), see, *United States ex rel. Armstrong* v. *Wheeler,* 321 F. Supp. 471 (E.D. Pa. 1970), or by service within the district made upon the local area commander who acted as the agent of the petitioner's commander in Indiana for the relevant discharge proceedings.

Finally, the ruling below will undermine the swiftness and certainty with which habeas corpus must be available,

and will effect a temporary suspension of the writ, a consequence forbidden by Article I, Section 9 of the Constitution. *Price* v. *Johnston,* 334 U.S. 266 (1948).

II.

The rule urged by the petitioner minimizes hardship to reservists in his position and imposes no significant inconvenience upon the Government. Respondents, however, have argued that such petitioners should either travel to the district where their command center is located and litigate there, or report to active duty—thereby assuming the very status which is being contested—and bring their writ in that district. Either suggestion is extremely burdensome to the petitioners while advancing no important government interests.

Requiring a reservist to report for active duty in a strange and distant community in order to litigate his right to release will seriously handicap his ability to do so. To impose this on a conscientious objector is even more harsh. The alternative of a preactivation petition in Indiana is equally cumbersome and time-consuming, when a matter of a few days can make a substantial difference in obtaining a meaningful remedy. Finally, *Ahrens* v. *Clark, supra* makes it uncertain that a petitioner such as Lt. Strait could even bring a habeas corpus application in Indiana, a district where he has never been and never will be.

On the other hand, allowing these reservists a forum where they reside will cause no significant inconvenience to the Government. The Government has counsel everywhere, these cases are usually heard on the administrative record, and statutory and decisional rules exist to prevent

forum shopping. Since petitioners like Lt. Strait are not part of any functioning military unit, any judicial stays of activation granted in the sound discretion of the court will impose minimal difficulties on the military services.

III.

Lt. Strait also pleaded jurisdiction pursuant to the Mandamus and Venue Act of 1962, 28 U.S.C. Sections 1361 and 1391(e). The court of appeals held that mandamus was not available in this case to review the administrative determinations. Its view of the proper scope of federal mandamus jurisdiction is erroneous and defeats the congressional policies of making it more convenient for citizens to challenge alleged illegal government actions.

The Army's denial of Lt. Strait's conscientious objector discharge application was not a "discretionary" determination unreviewable by the courts. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). Whatever discretion may have existed was exercised when the Secretary of Defense promulgated conscientious objector regulations. Once passed, those regulations must be adhered to, and agency decisions in contravention of the regulations can be challenged by mandamus. See *Ferry* v. *Udall*, 336 F.2d 706 (9th Cir. 1964). If the denial of such a discharge is "without basis in fact," then the agency failed to perform a clear duty owed the petitioner, *i.e.*, the duty to base its decision on legal criteria. Cf., *Estep* v. *United States*, 327 U.S. 114 (1946).

The court below failed to apply these principles of administrative mandamus because it confused them with the stricter requirements of judicial mandamus. See, *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d 949 (9th Cir. 1968).

Nevertheless, even under those stricter criteria, the court below should have exercised its "sound discretion" and directed the district court to entertain the mandamus application.

Moreover, the existence of the extraordinary remedy of habeas corpus will not foreclose mandamus relief since neither is a legal remedy; hence, the two are equally available. *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1968). See also, L. Jaffe, *Judicial Control of Administrative Action* 177 (1965). Therefore the potential existence of the habeas corpus remedy suggested by the government—namely litigation in one of two distant districts—does not justify the withholding of mandamus relief.

IV.

Jurisdiction exists under two other statutes alleged below, the Administrative Procedure Act, 5 U.S.C. Sections 701-04, and the provision conferring federal question jurisdiction, 28 U.S.C. Section 1331. The A.P.A. has long been held to be available as an alternative to habeas corpus in cases like this. See *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956). Similarly, the criteria for jurisdiction under Section 1331—a substantial federal question and the jurisdictional amount—are also met. This provision has been used to challenge analogous selective service decisions denying conscientious objector claims, see *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233 (1968), and there is no persuasive reason why this jurisdictional statute should not be equally available here.

In sum, the petitioner contends that the district court had jurisdiction under any of the bases pleaded to entertain his application.

ARGUMENT

I.

The District Court had jurisdiction under the habeas corpus statute, 28 U.S.C. Section 2241, to hear and determine the petitioner's claim for release from the United States Army.

The courts below disposed of the case by focusing on the habeas corpus issue, i.e., whether the United States District Court for the Northern District of California had jurisdiction to consider the habeas corpus application of an Army Reservist who, with the consent of the Army, resided within the territorial confines of that district, but whose military records were maintained at a nationwide reserve personnel center located in another state. Relying upon this Court's decision in *Schlanger* v. *Seamans, supra,* the court of appeals held that jurisdiction was lacking because the petitioner's custodian was not physically in the district. This conclusion is not required by the *Schlanger* decision, nor by the background of the modern development of habeas corpus jurisdiction against which it was decided, nor by any policy interests which should inform this Court's interpretation of the statute.

The traditional vehicle for judicial relief to unsuccessful military discharge applicants has been a petition for writ of habeas corpus, e.g., *Negre* v. *Larsen,* 401 U.S. 437 (1971); *Hammond* v. *Lenfest,* 398 F.2d 705 (2d Cir. 1968).[4] Habeas

[4] Habeas corpus has not been exclusively employed, however. See, *Still* v. *Commanding Officer,* —— F. Supp. ——, 4 SSLR 3785 (N.D. Ala. 1971); *United States ex rel. Clements* v. *Laird,* 3 SSLR 3863 (D. Md. 1971); *United States ex rel. Olsen* v. *Laird,* 3 SSLR

corpus jurisdiction rests by virtue of the potential restrictions the military can impose, even though a serviceman is not in actual physical custody. *Johnson* v. *Laird*, 435 F.2d 493 (9th Cir. 1970); *Hammond* v. *Lenfest, supra* at 711. While this concept of figurative rather than physical custody bothered some courts a few years ago, e.g., *Chavez* v. *Fergusson*, 266 F. Supp. 879 (N.D. Cal. 1967), *appeal dismissed as moot*, 395 F.2d 215 (9th Cir. 1968), a series of decisions by this Court which expanded the concept of custody generally, e.g., *Carafas* v. *La Vallee*, 391 U.S. 234 (1968); *Peyton* v. *Rowe*, 391 U.S. 54 (1968); *Jones* v. *Cunningham*, 371 U.S. 236 (1963), eventually resolved these doubts. A new category of territorial jurisdictional questions has arisen in the wake of this expansion of the Great Writ—questions that were virtually inconceivable a decade ago.

A "new class of petitioners" (A. 63) now exists wherein the persons restrained or detained are physically located, often quite permanently, in a district entirely separate from that of their custodians. The jurisdictional statute, 28 U.S.C. §2241(a), drafted prior to the appearance of this class of litigants, thus necessarily failed to consider this possibility. Hence the courts must define the geography of habeas corpus jurisdiction for these new petitioners by reference to the original Congressional intent behind Section 2241 and its predecessors, which was directed primarily at the problems of transporting prisoners from one

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3774 (M.D. N.C. 1970) [Mandamus]; *Berman* v. *Resor*, 302 F. Supp. 1200 (N.D. Cal. 1969) [Declaratory Relief and A.P.A.]; cf. also, *Oestereich* v. *Selective Service System, Local Board No. 11*, 393 U.S. 233 (1968); *Wolff* v. *Selective Service Board No. 16*, 372 F.2d 817 (2d Cir. 1967) [Pre-induction review under 28 U.S.C. §1331(a)].

district to another. *Ahrens* v. *Clark,* 335 U.S. 188, 191 (1948). Since this problem is obviously not relevant to military reservists, the Court is presented with a dilemma.

The closest the Court has come to facing this dilemma was in *Schlanger* v. *Seamans,* 401 U.S. 487 (1971), decided last term. But *Schlanger* was a factually unique case realistically having little bearing on the issues presented herein, as the Second Circuit concluded in *Arlen* v. *Laird,* —— F.2d ——, 4 SSLR 3692 (2d Cir. 1971). Because it is unique, *Schlanger* should be narrowly construed, lest its broader implications result in succeeding cases that are inconsistent with the purposes of the Great Writ.

A. *The Ruling in* Schlanger v. Seamans *Is Inapplicable to the Situation of an Unattached Inactive Duty Reservist Who Is Technically Commanded From a Central Record Keeping Center in a Remote District.*

In *Schlanger* v. *Seamans, supra,* the Court held that a district court where an active member of the Air Force was on leave did not have jurisdiction to hear his habeas petition because his commanding officer could not be found to be present in the district, even vicariously.

1. Active v. Reserve Duty.

Consider the significant differences in the military status of Sgt. Schlanger and Lt. Strait: Sgt. Schlanger, on active duty in the Air Force, had been assigned to and was physically present at, and performing military duties as a member of, an active functioning unit at Moody Air Force Base, Georgia, for approximately nine months prior to the temporary leave which took him to Arizona (*Schlanger* v. *Seamans,* Brief of Resp. 7-9); Lt. Strait was not on active

duty, and has never been a member of a functioning military unit, nor had he ever been physically present at Ft. Benjamin Harrison, Indiana, and his military orders never contemplated that he ever would be present there. On the contrary he had been physically present in the Northern District of California for ten consecutive months prior to filing his petition, and for most of his life before that.

Orders restraining the Air Force from returning Sgt. Schlanger to Georgia not only removed him from his unit where he had a specific duty assignment, but also effectively deprived the Air Force of his services for a substantial portion of his obligated period of active service. Orders restraining Lt. Strait's commencement of active duty merely prevented his preliminary active training at a particular moment in time. He still retained his full two-year active duty obligation, subject to the final outcome of his case on the merits.

The relative hardships to be suffered by active duty servicemen and reservists generally are also quite different, as will be developed fully below. See pp. 39-46, *infra*. When he was unable to obtain a forum in Arizona, Sgt. Schlanger returned to his unit in Georgia, resumed his duties and refiled his petition there (*Schlanger*, Brief of Resp. 12, n. 13). Under respondents' view of this case, however, the typical reservist will be forced to disrupt his life and perhaps undergo the significant change of status involved in reporting for active duty. *Scaggs* v. *Larsen*, 396 U.S. 1206 (1969) [Douglas, J. in chambers]; *Berman* v. *Resor*, 302 F. Supp. 1200, 1202 (N.D. Cal. 1969); see also pp. 41-43, *infra*.

2. Availability of a Forum.

In *Schlanger,* the government emphasized that "at all pertinent times" Sgt. Schlanger had "... a suitable forum for habeas corpus ..." available to him, *i.e.,* his assigned duty station in Georgia (*Schlanger,* Brief of Resp. 13). Here, however, there is a substantial question as to whether unattached reservists controlled from a command center in a remote district have any forum at all until they report for active duty, in view of this Court's earlier holding that the presence of the petitioner is a non-waivable habeas corpus jurisdictional requirement. *Ahrens* v. *Clark, supra.* See pp. 45-46, *infra.* Hence, an action at the site of the Reserve Center may be barred.

Nevertheless, even if the physical presence of the petitioner is not required, and such a forum exists in the district where the reserve center is located, there is a considerable question whether habeas corpus in a distant state is a *"suitable"* forum that is *"available at all pertinent times."* In this case, as in *Donigian* v. *Laird,* 308 F. Supp. 449 (D. Md. 1969), Lt. Strait learned of the Army's adverse decision less than a week before his anticipated active duty reporting date (at a post 3000 miles across the country), leaving inadequate time to have filed a habeas petition in Indiana. Moreover, regardless of the action taken by an Indiana court as regards interlocutory relief, either party would be greatly inconvenienced. If the court granted relief, then Lt. Strait and/or his counsel would have to travel to court for hearings from San Francisco, or, if the court denied temporary relief, the Army might be required to provide for Lt. Strait to make such appearances from his duty station in Georgia.

Furthermore, only a small number of reservists would find such a forum adequate, *i.e.*, those who have both the resources and sufficient time available prior to reporting for active duty to initiate a timely habeas corpus action. Ironically, this same class of petitioners would also suffer the most if *Ahrens* v. *Clark, supra,* were applied literally to foreclose them from bringing habeas corpus actions where they do not reside, since they would then have no forum for a substantial period of time. Cf. *Still* v. *Commanding Officer,* —— F. Supp. ——, 4 SSLR 3785 (N.D. Ala. 1971).

It is quite conceivable, therefore, that, regardless of the nature and/or similarity of their claims, three arbitrary jurisdictional sub-classes among reservists could be created:

1) a reservist attached to a unit in the district of his residence would be able to commence an action where he lives, whether or not he is under activation orders;

2) an unattached reservist with no activation orders would be limited exclusively to the possibility of petitioning in the single district where his service's Reserve Center is located; and

3) an unattached reservist with activation orders would realistically be limited to reporting for active duty prior to seeking judicial review, except in a few rare cases.

Certainly such a result not only would "ignore reality," *Arlen* v. *Laird,* —— F.2d ——, ——, 4 SSLR at 3694 (2d Cir. 1971), but would also exalt form over substance. *Donigian* v. *Laird,* 308 F. Supp. 449, 452 (D. Md. 1969).

3. Absence of Forum Shopping.

Schlanger v. *Seamans, supra,* had overtones of forum shopping; indeed, the government reserved the right to seek a transfer to a more convenient forum (*Schlanger,* Brief of Resp. 34-5). However, in the typical reservist case, as here, all possible venue and convenience requirements are easily satisfied in the reservist's home district.[5] Lt. Strait, for example, quite obviously both resided and was domiciled in the Northern District of California. It was his permanent home of record;[6] he lived there, banked there, paid taxes there, and was registered for the draft there (A. 34); all communications from the Army were addressed to him there (A. 19, 27, 39, 44, 46, 47); the administrative proceedings under review largely took place there (A. 18, 20-26); and his physical presence there was not only authorized by the Army but was integrally related to his educational delay, being the culmination of his legal studies (A. 4-5, 34).

Consequently, the spectre of "forum shopping" is not present in this case, nor have respondents ever suggested otherwise.

These crucial distinctions, between the highly unusual situation in *Schlanger* and the normal case of the unattached reservist represented here, were relied upon by the Second Circuit in *Arlen* v. *Laird, supra,* a case virtually

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[5] In the untypical case, the courts should have little difficulty dismissing actions for lack of proper venue. See *McKay* v. *Secretary of the Air Force,* 306 F. Supp. 1252 (D. Mass. 1969). Indeed the problems arising herein are venue, not jurisdictional problems. See pp. 26-27, 47-48, *infra.*

[6] In *Schlanger* respondents made pointed note of the fact that Sgt. Schlanger did not even claim Arizona as his permanent home of record (Brief of Resp. 31, n. 25).

identical to this one, in holding that there was habeas corpus jurisdiction in the district where the unattached reservist resides. Explicitly rejecting the reasoning of the decision below, Judge Hays analyzed the problem as follows:

> The practical circumstances of the serviceman on active duty and the unattached reservist are sufficiently different to warrant different results in deciding the question of jurisdiction. Usually a serviceman and his commanding officer are physically present within the same territorial jurisdiction. *Schlanger* involved an unusual situation of detached, temporary duty; *United States ex rel. Rudick* v. *Laird*, 412 F.2d 16 (2d Cir.), *cert. denied*, 396 U.S. 918 (1969) and *Feliciano* v. *Laird*, 426 F.2d 424 (2d Cir. 1970) involved servicemen on leave from or in transit to active duty stations. In those cases the servicemen were directly under orders of immediate commanding officers, and their physical separation from their commanding officers was temporary. The unattached reservist such as petitioner does not in fact have a direct commanding officer. The title of "commanding officer" given to the commander of the "centrally located, nationwide record keeping center" at Fort Benjamin Harrison is hardly more than a convenient fiction. See Hansen, *The Jurisdictional Bases of Federal Court Review of Denials of Administrative Discharges from the Military I*, 3 Sel. Serv. L. Rep. 4001, 4006 n. 60 (1971). Petitioner has never been in the same jurisdiction as his nominal "commanding officer." Petitioner's presence within the jurisdiction of the District Court for the Southern District of New York is neither temporary as in *Rudick*

and *Feliciano* nor sham for purposes of forum shopping. Since November, 1969 petitioner has worked and resided here. Whatever contact the commanding officer of the Center has had with petitioner has been in New York. The respondent had custody of petitioner in New York; petitioner initiated his application for discharge from New York and the required interviews were conducted here; all orders were sent to petitioner in New York. At no time was he required or requested to go to Fort Benjamin Harrison. Unlike the petitioners in *Schlanger, Rudick,* and *Feliciano,* the military has never required petitioner to be in the same jurisdiction as his "custodian." In those cases it was sensible to require that the petitions be filed in the jurisdictions where the petitioners normally resided, worked, were in custody, and were subject to orders. But where, as here, petitioner has never been within the same jurisdiction as his "commanding officer" and where for almost two years any contacts petitioner had with his commanding officer and the military have occurred within this jurisdiction, we believe that, if it is necessary to find that the nominal custodian is "present" in the jurisdiction, respondent's contacts with petitioner in New York are sufficient to be termed "presence."

It would be quite unreasonable and inequitable to read §2241(a) as requiring this petitioner to file for the writ in a distant jurisdiction in which he has never been and with which he has no real contacts at all. Such a requirement would entail needless expense and inconvenience. —— F.2d ——, ——, 4 SSLR 3692, 3693-94.

Properly limited, *Schlanger* is distinguishable from the situation presented here and is no bar to holding that the district court had jurisdiction to entertain this application.

B. *Habeas Corpus Jurisdiction Exists Even Within the Framework of* Schlanger v. Seamans.

In its brief in *Schlanger* v. *Seamans*, 401 U.S. 487, *supra*, the government conceded that habeas corpus jurisdiction would exist in districts where unattached reservists reside, as follows:

> "Such a situation would be presented by an occasional serviceman who, unlike petitioner here, is *stationed* at an isolated location in a district where there is no commanding officer; such a serviceman might well be allowed—in the exercise of the flexibility inherent in the statutory scheme—to file his habeas corpus petition in the district of his 'custody,' *i.e.*, where he is stationed, with extraterritorial jurisdiction over the person of his immediate commanding officer. Otherwise there would be no district in which a petition could be filed.
>
> Similar considerations led to the result in *Donigian* v. *Laird, supra*, involving a reserve officer, located in the district of Maryland, who had no custodian in any real sense other than the commander of the personnel center for reservists in Indiana. In this admittedly 'highly unusual situation' (308 F. Supp. at 453)—where there was no concurrence of custody and custodian in any district in the United States—the court allowed a petition to be filed in the district where the reserve officer was at the time actually attending graduate school, with the Army's permission, and where at least part of the military's processing of his discharge application had taken place. See n. 23, *supra*. We disagree, of course, with the *Donigian* court's reliance upon Section 1391(e), and with the similar lower court decisions in two other districts

upon which petitioner relies (Pet. Br. 17)." *Schlanger*, Brief of Resp. 33, n. 28.

The government's statement in *Schlanger* was not merely a concession made in debate; it expressed an accurate view of the law prior to *Schlanger*, reflecting traditional notions of habeas corpus jurisdiction.

1. Judicial History Behind *Schlanger*.

Until recent decisions of this Court expanded the usage and availability of the Great Writ, see p. 16, *supra*, cases invoking the territorial limits of habeas corpus jurisdiction were unusual, e.g., *Carbo* v. *United States*, 364 U.S. 611 (1961); *Ahrens* v. *Clark*, 335 U.S. 188 (1948); *Ex Parte Endo*, 323 U.S. 283 (1944). Moreover, in each of these cases it was the *absence from the district of the petitioner*, not the custodian, that was considered critical.

In *Carbo* the defect was held not fatal because of the distinction between the Great Writ and the writ of *habeas corpus ad prosequendum*. The Court noted, however, that the territorial limitations on jurisdiction to issue the Great Writ existed because "it was thought inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with authority to issue the Great Writ on behalf of *applicants far distantly removed from the courts whereon they sat.*" *Carbo* v. *United States*, 364 U.S. at 617, *supra* [emphasis added].

In *Ahrens* the petitioners filed in a district where their custodian was located,[7] but where they were not physically

[7] The Court left undecided the question of whether the Attorney General, under whose order they were detained, was a proper respondent. 335 U.S. at 193.

present. The Court held that the petitioners' physical presence was a subject matter jurisdictional requirement. The Court observed that a contrary rule would result in administrative difficulties involved in transporting prisoners to districts other than those where they are located. 335 U.S. at 191. The Court pointedly noted that "[i]t is not sufficient . . . that the jailer or custodian alone be found in the jurisdiction." *Id.* at 190.

In *Endo,* the problem arose because the petitioner had been removed from the jurisdiction after the proceedings commenced, but the Court rejected rigid formulae as to the issuance of the Great Writ in order that its "objective may in no way be impaired" and held that jurisdiction was determined at the date of filing. 323 U.S. at 306-7.[8]

As late as 1970, in an opinion by Chief Justice Burger, this Court noted that new jurisdictional problems have arisen in the interim since Congress last amended §2241 and said that "[w]hether . . . the rigor of our *Ahrens* holding may be reconsidered is an issue upon which we reserve judgment." *Nelson* v. *George,* 399 U.S. 224, 228, n. 5 (1970).

Prior to *Schlanger* the lower federal courts, in dealing with these multi-state jurisdictional problems in both traditional prisoner and military cases, had concluded that *Ahrens* v. *Clark,* 335 U.S. 188, *supra,* now had to be read

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[8] The Court concluded that the removal of the petitioner was not fatal because a "respondent who ha[d] custody of the prisoner" could be found in the district. *Id.* at 307. This was a fiction, albeit a practical fiction. The petitioner was actually physically detained in a distant state, but the alleged custodian was deemed to be "any official of the War Relocation Authority . . . whose office is at San Francisco. . . ." *Id.* at 305. By analogy, Lt. Strait's service herein on the Commanding General of the Sixth Army (A. 31) should similarly satisfy this jurisdictional requirement. Gen. Larsen was clearly acting as an agent of the commanding officer at Ft. Benjamin Harrison. See pp. 34-35, *infra.*

as a venue decision in order to avoid potentially insoluble dilemmas. Among the venue criteria to be considered are the following: first, the physical presence of the petitioner, *Word* v. *North Carolina*, 406 F.2d 352, 355 (4th Cir. 1969); second, convenience to the parties, weighing both the necessity that habeas corpus be a convenient and swift remedy and the possibility of hardship to respondents, cf. *George* v. *Nelson*, 410 F.2d 1179 (9th Cir. 1969), *aff'd on other grounds*, 399 U.S. 224 (1970); *United States ex rel. Armstrong* v. *Wheeler*, 321 F. Supp. 471, 478 (E.D. Pa. 1970); *Donigian* v. *Laird*, 308 F. Supp. 449, 453 (D. Md. 1969); third, convenience of the forum with respect to trial of the issues, *United States ex rel. Meadows* v. *New York*, 426 F.2d 1176, 1183 (2d Cir. 1970); *Word* v. *North Carolina*, 406 F.2d at 356-7, *supra*; *Donigian* v. *Laird*, *supra*; and fourth, whether the custodian had sufficient contacts with the district to be amenable to service of process therein. *United States ex rel. Armstrong* v. *Wheeler*, *supra*; *Donigian* v. *Laird*, *supra*.

2. Clarification of *Schlanger* Is Appropriate.

Consequently, the Court's emphasis in *Schlanger* v. *Seamans* on the presence of a custodian in the district would appear to be inconsistent with the prior body of law, unless it is seen as a personal jurisdictional holding. If, consistent with its unique facts (*i.e.*, the active-duty serviceman who is voluntarily away from his assigned post), it is construed as a personal jurisdictional holding, then rules can be fashioned, consistent with Congressional intent and the noble purposes of the Great Writ itself, to avoid extremely harsh consequences in cases of unattached reservists. Such a rule would avoid unduly burdening the

courts in some locales, while at the same time preventing abuses in the nature of forum shopping. Such proposed rules, clarifying *Schlanger*, are herewith presented.

a. *The Presence of the Petitioner Creates a Presumption in Favor of Jurisdiction.*

28 U.S.C. §2241 vests district courts with jurisdiction over habeas corpus actions arising "within their respective jurisdictions." This Court has said this limits "the district courts to inquiries into the causes of restraints of liberty of those *confined or restrained within the territorial jurisdictions* of those courts." *Ahrens* v. *Clark*, 335 U.S. at 190, *supra* [emphasis added]. Where the petitioner and the respondents reside in different districts the first and obvious question to be asked is where is such a petitioner confined? Does the restraint exist only where the respondent resides, or does it exist where its effects are felt, *i.e.*, where the petitioner is located?

Rationality compels the latter answer. After all, it is the petitioner, not the respondent, who complains of the restraint. Hence in cases of confinement by remote control, the courts should presume, subject to rebuttal, that the confinement exists where the petitioner is located. In some cases the presumption may be readily overcome when petitioner's whereabouts are unknown to respondent, as for example, an escaped prisoner or a serviceman absent without authority. Then, of course, the restraints are not felt in the district.

In other cases, such as reservist cases, the courts may inquire into factors such as the length and permanency of the residence, whether or not the approval of the service

was obtained, and the availability of other forums.[9] In these cases the courts may look also to factors relating to the respondent's activities. Did the respondent's reach extend into the district? Did the administrative or judicial proceedings under review take place in the district? Are there agents of the respondent in the district who have established contact with the petitioner? These criteria are important because the effect of the writ is felt by its service on the custodian, and the court must have personal jurisdiction over the respondents. See discussion, *infra* at pp. 31-32.

After weighing such factors, a court may find that the restraint is really not at all related to the district despite petitioner's presence there. Or, as in the instant case, the substantial amount of contacts with the district on the part of both petitioner and respondents, and the absence of such contacts elsewhere, may enforce the presumption created by petitioner's presence and cause the court to logically conclude that the restraint arises within its jurisdiction.

Such a result will serve the policies behind the territorial limitations imposed by 28 U.S.C. §2241, as interpreted in *Schlanger*. First, since the petitioner is already present in the district it will be unnecessary for the respondents to engage in the costly, time-consuming efforts to transport the petitioner to the district where the proceedings are pending. See, *Ahrens* v. *Clark*, 335 U.S. at 191. (Note also the absence of escape problems in these cases.)

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[9] A serviceman on active duty who is on leave or in transit can always return to the site of the unit from where he departed and jurisdiction will immediately exist. See, *Feliciano* v. *Baird*, 426 F.2d 424 (2d Cir. 1970); *Laxer* v. *Cushman*, 300 F. Supp. 920 (D. Mass. 1969).

Second, other potential witnesses who participated in the prior administration or judicial proceedings will be at least as readily available in the forum district as elsewhere, and in many cases more readily available. And third, the court will not have difficulty ensuring that its ultimate decision is abided by, again because of the proximity to the petitioner. If the decision releases the petitioner from his restraints, an uncooperative respondent would have to enter the district in order to defy the court's order.

Lt. Strait believes that the above rule is consistent with the purpose of and result reached in *Schlanger* v. *Seamans*, 401 U.S. 487, *supra*, and would effect a salutary clarification of that case, as well as *Ahrens* v. *Clark*, 335 U.S. 188 (1948). The thrust of *Schlanger* clearly appears to go to personal jurisdiction, not subject matter jurisdiction. By not reaching the question presented by *Donigian* v. *Laird*, *supra*, the Court concentrated on the personal jurisdiction questions raised by the physical absence of the custodian, rather than subject matter questions. Other aspects of the opinion confirm that view; *e.g.*, the concern with the custodian's non-amenability to service of process including the footnote consideration of 28 U.S.C. §1391(e). 401 U.S. at 490-1, n. 4. Furthermore, no decision of this Court, including *Schlanger*, has ever held that both the petitioner and his custodian must be physically present in the same district in order for subject matter habeas corpus jurisdiction. Despite this, at least one court has put *Ahrens* v. *Clark*, 335 U.S. 188, *supra*, and *Schlanger* v. *Seamans*, *supra*, together and has reached that conclusion, thereby holding that no habeas corpus jurisdiction exists anywhere in this class of cases. See, *Still* v. *Commanding Officer*, —— F. Supp ——, 4 SSLR 3785 (N.D. Ala. 1971). See

also the dissenting opinion of Rutledge, J. in *Ahrens,* 335 U.S. at 196. Such a rule would of course create a serious conflict with other decisions that have expanded subject matter usage of the Great Writ.

b. *Under the Circumstances of This and Similar Cases, the Custodian May Be Found in the District for Jurisdictional Purposes.*

In the instant case the presence of the petitioner is not the only cause of the restraint in the Northern District of California, for Lt. Strait's nominal custodian was also jurisdictionally "present" in the district. The commanding officer of the Reserve Center directed orders to Lt. Strait in the district, and, when necessary, enlisted the aid of other Army officers in the district to carry out those orders. (AR 135-25, para. 7a.; see pp. 5-6, *supra.*) By these acts the commanding officer may be said to be "present" in the district, even though his body is not so present. As the Second Circuit said, "To give the commanding officer of the Center 'custody' of the thousands of reservists throughout the United States and to hold at the same time that the commanding officer is present for habeas corpus purposes only with one small geographic area is to ignore reality." *Arlen* v. *Laird,* —— F.2d ——, ——, 4 SSLR 3692, 3694 (2d Cir. 1971). Accord: *United States ex rel. Armstrong* v. *Wheeler,* 321 F. Supp. 471, 478, n. 11 (E.D. Pa. 1970); *Donigian* v. *Laird,* 308 F. Supp. 449, 453 (D. Md. 1969).

Nor is such a presence-through-contacts theory of jurisdiction a novel one—it has a long and well-established tradition in our jurisprudence, *McGee* v. *Int'l Life Ins. Co.,* 355 U.S. 220 (1957); *Int'l Shoe Co.* v. *Washington,* 326 U.S. 310

(1945); including its application to natural persons. *Calagaz* v. *Calhoun*, 309 F.2d 248, 255 (5th Cir. 1962). It is noteworthy in fact that in *McGee* v. *Int'l Life Ins. Co.*, *supra*, the contacts upon which jurisdiction attached were written communications. Here, of course, there are much more substantial contacts than mere writings through the many physical contacts that took place between Lt. Strait and subordinates of the Sixth Army Commanding General. It was on a similar basis that this Court found a custodian "present" in the Northern District of California in *Ex Parte Endo, supra,* even though the petitioner's actual "jailer" and ultimate custodian were elsewhere. Thus, although there was no concurrence of the "physical" presence of Lt. Strait and his nominal custodian, there was a concurrence of "jurisdictional presence."

Such an approach is not only realistic but may be required in cases of unattached reservists because it is difficult to determine which actual "person" is the "custodian." From this record it is entirely unclear as to who is Lt. Strait's immediate commanding officer, nominal or otherwise. It appears that no specific person is the "commanding officer" or "custodian" of reservists whose records are maintained at the Reserve Center. Rather the function is diffused among various staff officers depending on the nature of the function to be performed.[10] Consequently, to require the physical presence of the custodian would be unrealistic for this reason as well.

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[10] Although Col. Hoffman is the Commanding Officer of the Reserve Personnel Center, he did not perform the functions required of the individual's immediate commanding officer as described in AR 135-25. Paragraph 7.e.(1) states that the individual's immediate commander will submit certain information together with his recommendation and reasons therefor when the discharge application is submitted to the review board. In Lt.

c. *Having Found a Restraint Within the District, the Court's Process May Be Served Under One of Several Theories.*

1.) Use of 28 U.S.C. §1391(e).

In *Schlanger* this Court noted that "the legislative history [behind 28 U.S.C. §1391(e)] is barren of any indication that Congress extended habeas corpus jurisdiction." 401 U.S. at 490, n. 4.[11] Be that as it may, there is no reason why the service of process provisions contained therein may not be used to effect personal jurisdiction, once subject matter jurisdiction is found to exist. This was the holding of the Ninth Circuit recently in *Smith* v. *Campbell*, —— F.2d ——, 4 SSLR 3652 (9th Cir. 1971), a case reminiscent of *Ex Parte Endo, supra.* Indeed, had

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Strait's case, this function was performed by a Lt. Col. Raymond Vawter, who was the Chief of the Delayed Officer Management Division at the Reserve Center (A. 10, 41). (In *Still* v. *Commanding Officer*, —— F. Supp. ——, 4 SSLR 3785 (N.D. Ala. 1971), the court observed that the Army apparently considers this staff officer to be the immediate commanding officer of delayed active duty officers.) Surprisingly, the record reveals that Lt. Col. Vawter was also a permanent member of the Conscientious Objector Review Board at Ft. Benjamin Harrison (A. 40). It seems strange that the Commanding Officer of the Reserve Center would appoint this officer to a board on which he would be reviewing his own recommendations.

[11] The legislative history is equally barren of any indication that Congress did *not* intend to thus broaden the reach of the courts' personal jurisdiction in habeas corpus actions, especially those relating to federal administrative determinations. There is some authority that so holds. *Meck* v. *Commanding Officer*, 320 F. Supp. 1246 (E.D. Pa. 1970); *United States ex rel. Lohmeyer* v. *Laird*, 318 F. Supp. 94 (D. Md. 1970); *Silberberg* v. *Willis*, 306 F. Supp. 1013 (D. Mass. 1969), *reversed on other grounds*, 420 F.2d 662 (1st Cir. 1970).

Also the Court's reliance on *Harris* v. *Nelson*, 394 U.S. 286 (1969), appears to be misplaced. *Harris* involved the application of the judicially promulgated Federal Rules to habeas actions, not the application of a Congressionally created provision for service of process in civil actions.

§1391(e) existed when this Court decided *Endo,* it would undoubtedly have relied on it as well as, or rather than, personal service on an agent to effect the jurisdiction that had attached when the petition was filed.

In a variation, some courts have held that service pursuant to §1391(e) satisfies the notice requirements on a remote respondent who was found to be vicariously present in the district, thus effecting personal jurisdiction but not creating subject matter jurisdiction by virtue of that provision. *United States ex rel. Armstrong* v. *Wheeler,* 321 F. Supp. 471 (E.D. Pa. 1970); *Donigian* v. *Laird,* 308 F. Supp. 449 (D. Md. 1969). That was also the holding of the court of appeals below in its now vacated opinion (A. 64).

Lt. Strait suggests that this approach produces the most rational result, without engaging either in possible undue extension of §1391(e)'s purview, or needless fictions as to service on locally situated agents. By this process, together with actual service on the local United States Attorney, a petitioner unquestionably provides the appropriate respondent with notice of the action and with a real opportunity to be heard on the issues raised therein.

2.) Personal Service on the Personnel Center's Agent in the District.

Lt. Strait named and personally served the Commanding General of the Sixth United States Army at the Presidio of San Francisco, California, within the Northern District of California. The inclusion of Gen. Larsen was based on two theories. First, more than the remote, nominal; and somewhat fictional custodian(s) at Ft. Benjamin

Harrison, Gen. Larsen, as commander of the Army area where Lt. Strait lived, exercised physical control over him. All military activities requiring Lt. Strait's presence had been carried out at Army posts within Gen. Larsen's command and by subordinates of Gen. Larsen pursuant to his orders (A. 18). Moreover, should Lt. Strait have disobeyed an order issued from the Center in Indiana, he would have been detained by Army authorities where he was located (A. 34). The second theory behind service on Gen. Larsen is that he is the agent of Lt. Strait's nominal custodian in Indiana, and hence may be served on behalf of said individual. This was the basis of obtaining service over the custodian in *Ex Parte Endo,* 323 U.S. 283 (1944).

Although the Army will undoubtedly deny such a relationship because the "mysteries of Army bookkeeping" obscure such matters, *Feliciano* v. *Laird,* 426 F.2d 424, 427, n. 4 (2d Cir. 1970), its protestations defy reality. For example, Navy area commanders are apparently considered to have command of unattached reservists assigned to the Navy Reserve Personnel Center. See, *Brage* v. *Laird,* 4 SSLR 3516 (D. Minn. 1971); *United States ex rel. Ryan* v. *Broughton,* 4 SSLR 3498 (D. Minn. 1971).

Accordingly, if this Court's footnote in *Schlanger* is to be interpreted broadly to exclude any utilization of 28 U.S.C. §1391(e) in habeas corpus proceedings, then unlike in *Schlanger,* personal service of process in this case was duly made upon the Army's highest regional official found within the Northern District of California, who had acted theretofore as the agent of the commanding officer of Ft. Benjamin Harrison.

C. *A Result Contrary to That Urged by Lt. Strait May Lead to a Constitutionally Forbidden Temporary Suspension of the Writ of Habeas Corpus.*

If *Schlanger* is considered a "subject matter" decision, rather than a "personal" jurisdiction decision, and if the commander of the Reserve Center cannot be found in the district vicariously, then in combination with *Ahrens* v. *Clark,* 335 U.S. 188 (1948), suspension of the writ of habeas corpus, albeit temporary in nature, will have occurred. The Constitution of the United States, Article I, Section 9, provides that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." This clause has not been frequently interpreted, but the cases do indicate that any rule which restricts or delays the availability of the Great Writ is suspect.

Consideration of this clause must start with the premise that the Writ is "one of the basic safeguards of personal liberty . . .," *Hirota* v. *McArthur,* 338 U.S. 197, 201 (1948) [Douglas, J., concurring], and that, as such, one of its greatest characteristics is that it "afford[s] a swift and imperative remedy . . .," *Secretary of State for Home Affairs* v. *O'Brien,* (1923) A.C. 603, 609, quoted in *Developments—Federal Habeas Corpus,* 83 Harv. L. Rev. 1038, 1040 (1970). This function of the Great Writ was discussed and endorsed by this Court in *Price* v. *Johnston,* 334 U.S. 266 (1948), as follows:

> "The writ of habeas corpus has played a great role in the history of human freedom. It has been the judicial method of lifting undue restraints upon personal liberty. * * * The most important result of such usage has been to afford a swift and imperative rem-

edy in all cases of illegal restraint upon personal liberty." 334 U.S. at 269.

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"Moreover, the principle has developed that the writ of habeas corpus should be left sufficiently elastic so that a court may, in the exercise of its proper jurisdiction, deal effectively with any and all forms of illegal restraint. The rigidity which is appropriate to ordinary jurisdictional doctrines has not been applied to this writ. * * * Only in that way can we give substance in this case to our previous statement that 'dry formalism should not sterilize procedural resources which Congress has made available to the federal courts.'" *Id.* at 284. See also, *Harris* v. *Nelson,* 394 U.S. 286, 291 (1969) ["... a prompt and efficacious remedy ..."], quoting *Fay* v. *Noia,* 372 U.S. 391, 401 (1963).

Discussing this language in *Price,* the district court in *St. Clair* v. *Hiatt,* 83 F. Supp. 585, 586 (N.D. Ga. 1949), *aff'd,* 177 F.2d 374 (5th Cir. 1949), further said:

"Any statute which might tend to weaken its efficiency or delay its availability or makes its use more difficult should be carefully considered and construed liberally in the light of its history and its benign purposes."

Similarly in *Hirota* v. *McArthur, supra,* Mr. Justice Douglas said:

"There is no room for niggardly restrictions when questions relating to its availability are raised. The statutes governing its use must be generously con-

strued if the great office of the writ is not to be impaired." 338 U.S. at 201.

It may be argued that the writ has not been suspended as regards Lt. Strait because a) he might have been able to file in Indiana, or b) he could have waited until he reported for active duty in Georgia to have a forum. Certainly these alternatives are not sufficiently available and adequate to serve the great purposes described above. To require such cumbersome procedures hardly connotes the kind of flexibility and elasticity attributed to the writ. Rather it sounds of the "rigidity which is appropriate to ordinary jurisdiction doctrines. . . ." *Price* v. *Johnston*, 334 U.S. 266, 284, *supra*. Indeed, Congress has never attempted to define precisely the territorial limitations of habeas corpus jurisdiction, but has been content for nearly a century with the intentionally ambiguous language now found in 28 U.S.C. §2241 in order to give the courts the kind of flexibility required when dealing with the Great Writ.

Such flexibility is demanded here. A military reservist wants to be heard before, not after, the restraint of active duty is felt, *Scaggs* v. *Larsen*, 396 U.S. 1206 (1969) [Douglas, J. in chambers]; *Arlen* v. *Laird*, —— F.2d —— (2d Cir. 1971); *Berman* v. *Resor*, 302 F. Supp. 1200, 1202 (N.D. Cal. 1969), especially a conscientious objector who is no longer protected by the provisions of D.O.D. Dir. 1300.6 regarding his duty assignments. He does not wish to "gamble with his liberty," *Pedreiro* v. *Shaughnessy*, 213 F.2d 768, 769 (2d Cir. 1954), *aff'd*, 349 U.S. 48. (1955), for the cloak of military status once assumed, is not easily shed.

II.

Policy considerations support the interpretation of the habeas corpus statute urged by the petitioner and the conclusion that the District Court had jurisdiction.

When courts review denials of requests for military discharge, they ordinarily face questions of law, presented on undisputed and brief administrative records, wherein they must determine whether the procedures followed were correct and, if so, whether there was a "basis in fact" for the action taken. The instant case is typical. Lt. Strait raised legal issues relating both to procedural deficiencies and the absence of a "basis in fact" for the denial of his conscientious objector discharge. Moreover, Lt. Strait, because he received notice of the adverse administrative decision on the eve of reporting for active duty, required prompt judicial action, which, in fact, he obtained, as is customary in these cases. E.g., *Hammond* v. *Lenfest*, 398 F.2d 705 (2d Cir. 1968); *Donigian* v. *Laird*, 308 F. Supp. 449 (D. Md. 1969); *Silberberg* v. *Willis*, 306 F. Supp. 1013 (D. Mass. 1969), *reversed on other grounds*, 420 F.2d 662 (1st Cir. 1970).

Respondents have urged, however, that in order for the courts properly to review this case, the petitioner should have traveled to a distant state and, perhaps should have assumed the very military status which his beliefs of conscience forbade and which he contended was being illegally demanded of him. Accordingly, three alternatives for bringing such actions are suggested: (1) in the district of the reservist's residence as proposed by Lt. Strait; and (2) in the district where the Reserve Center is located, or (3) where the reservist is required to report to active duty.

Certainly the last two alternatives present ineffective and vexatious ways for the federal judiciary to adjudicate such claims. In the last quarter century, Congress has repeatedly expressed its concern for the problems of citizens seeking judicial redress from adverse administrative actions of the geographically diversified agencies of the federal government. It has repeatedly permitted such actions to be brought at the place of the aggrieved citizen's residence, rather than at the seat of the government. Lt. Strait, and others similarly situated, should not become a class judicially excluded from this Congressional design. There are no persuasive reasons why he should be forced "to leave his home and his work in order to contest the power of the Army to force him to do so." *Arlen* v. *Laird*, —— F.2d ——, ——, 4 SSLR 3692, 3694 (2d Cir. 1971). As Judge Harold Medina said in a related context:

> "Under these circumstances it would seem that the courts must be able to spell out some simple formula, which will cut through red tape, face realities, and provide an expeditious and inexpensive remedy, with a minimum amount of procedural frills and a maximum amount of attention to the question of whether or not the administrative proceedings . . . have conformed to the requirements of due process." *Pedreiro* v. *Shaughnessy*, 213 F.2d at 769, *supra*.

The formula suggested by the petitioner minimizes hardship to this class of reservists without inconveniencing the government in any significant way. The result urged by the respondents maximizes the hardship to reservists without advancing any reasonable policy objective.

A. *The Decision Below Will Cause Severe Hardship to Military Reservists Like the Petitioner.*

Respondents seriously understate the problems encountered by persons who must do judicial battle with the military in districts hundreds or thousands of miles from their homes (Resp. to Pet. 5). They offer such reservists two alternatives: travel to the district where the Command Center is located and litigate there or report for active duty and file suit in that district. Either alternative imposes needless hardship.

1. Active Duty Alternative.

The jurisdictional alternative suggested most seriously by respondents in this case is that Lt. Strait travel to Georgia (at government expense), report for active duty, and then file his petition (*Id.* at 7, n. 3). This proposal involves several serious problems, the least of which is financial.

a. *The Conscientious Objector on Active Military Duty.*

The first and most onerous hardship is the two-fold burden of assuming the very military status which is contested. The conscientious objector must not only live with his own attitudes about military status, but also, live with the hostile feelings of the military toward him, as Mr. Justice Douglas observed in his dissenting opinion in *Ehlert* v. *United States,* 402 U.S. 99, 109-13 (1971). Further, the *Ehlert* majority's notation, 402 U.S. at 106, n. 9, that inductees seeking conscientious objector discharge must be assigned to non-combatant duties, does not apply here.[12]

[12] Unlike persons whose applications are still pending before the military, Lt Strait and others who have received final adverse decisions are not protected by regulation against being ordered to

Thus, upon his reporting for active duty there would be nothing to prevent the Army from assigning Lt. Strait to repugnant duties pending the outcome of his court action. Furthermore, if Lt. Strait found he could not perform his assigned duties in good conscience, he could become enmeshed in court-martial proceedings while his civilian court action was indefinitely stayed. *Parisi* v. *Davidson*, 435 F.2d 299 (9th Cir. 1971), *cert. granted*, 402 U.S. 942 (1971).[13] One can hardly blame Lt. Strait "for unwillingness to gamble with his liberty which may not readily be regained." *Pedreiro* v. *Shaughnessy*, 213 F.2d at 769, *supra*.

b. *Problems of a Strange Community and Cost.*

Even assuming that his military life goes smoothly, many substantial hardships and problems can be encountered by a petitioner suddenly thrust into an alien environment thousands of miles from his community, home, friends, and informed counsel who represented him at the administrative level. Finding competent professional assistance in a strange community on short notice is difficult

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violate their beliefs pending judicial review. D.O.D. Dir. 1300.6 (Aug. 20, 1971), para. VII.C. provides as follows:

> "Persons who are assigned to non-combatant duties, and persons who are assigned to normal military duties by reason of disapproval of their application, will be expected to conform to the normal requirements of military service and to perform satisfactorily such duties to which they are assigned. Violations of the Uniform Code of Military Justice by these members will be treated as in any other situation."

[13] Conscientious objectors are in fact poorly assimilated into the military, Sherman, *Judicial Review of Military Determinations*, 55 Va. L. Rev. 483, 522 (1969), and they frequently become involved in disciplinary proceedings. E.g., *Parisi* v. *Davidson*, *supra*; *Bratcher* v. *McNamara*, 448 F.2d 222 (9th Cir. 1971); *Craycroft* v. *Ferrall*, 408 F.2d 587 (9th Cir. 1969), *vacated and remanded*, 397 U.S. 335 (1970).

enough for the ordinary person; the problems are multiplied for one who desires immediately to commence a hazardous judicial proceeding while on active duty in the Army.[14] These handicaps are unduly burdensome both as to cost and delay in obtaining judicial review; to some, they could become an insurmountable barrier.

c. *Delays Involved in Post-Activation Suits.*

Finally, even if petitioner is able to overcome these burdens, the post-activation remedy is not suitable due to the delays involved. First, the reservist wants a judicial ruling on whether or not he has to go on active duty before, not after, he has done so. See *Arlen* v. *Laird, supra.* If a reservist must accordingly wait months, weeks, or even days, to file his petition, the Great Writ has lost the element of swiftness traditionally associated with it. Second, there is no way to predict what developments a particular case will take, and much time can elapse before the activated reservist is released from his restraint. See, e.g., *United States ex rel. Greenwood* v. *Resor, supra* (where the petitioner was apparently on active duty for about a year before the Court of Appeals ordered his discharge).

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[14] In *United States ex rel. Greenwood* v. *Resor,* 439 F.2d 1249, 1252, n. 5 (4th Cir. 1971), the court enumerated some of the legal difficulties that can be encountered in these cases. Moreover, in the past there was considerable judicial resistance to grant relief in conscientious objector discharge cases. Indeed, D.O.D. Directive 1300.6 had been in effect six years before the first court-ordered discharge was reported. Hansen, *Judicial Review of In-Service Conscientious Objector Claims,* 17 UCLA L. Rev. 975, 976 (1970). Some of this resistance still exists. See, e.g., *Lawson* v. *Laird,* 443 F.2d 617 (5th Cir. 1971) (where the Court of Appeals was required to direct a district court to hear and consider habeas corpus applications that even the government, on appeal, conceded stated *prima facie* grounds for relief).

2. The Pre-Activation Reserve Center Alternative.

All but one of the difficulties discussed above would apply if Lt. Strait were to file his petition in the district where the Reserve Personnel Center is located. The exception, of course, is the hardships involved in actually being on active duty.

But all of the other cumbersome and costly problems associated with litigating in a strange and distant forum would be present in the district where the Reserve Center is located.[15] Moreover, if the court denied interlocutory relief, the Reserve Center forum would be the least desirable of the three alternatives. A situation would then exist where Lt. Strait would be in Georgia, his primary counsel in California and the case pending in Indiana (or Missouri).

In addition, much of the swiftness associated with habeas corpus is also lost when a petitioner and his counsel must occupy hours or days of their time travelling across country to the court. In many of these cases a day or less can make the difference in obtaining a meaningful remedy which often involves the necessity of interlocutory relief. This case is typical in this regard.

Lt. Strait's request for discharge was denied April 7, 1970, and he was notified of that fact by a letter dated the same day, and by which he was also informed that he would be expected to comply with orders to report for active duty on April 13, 1970. He thereupon filed this action in the district court and obtained a restraining order on April 10, 1970.

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[15] Indeed, the cost factor might be greater since the Army would not pay Lt. Strait's own travel costs in getting there if that became necessary.

The case was then heard, and an order denying the petition was entered July 28, 1970. Counsel immediately obtained a stay of that ruling on July 31, 1970, in order to seek reconsideration in the district court or an injunction pending appeal. Both motions were denied on August 4, 1970, but the restraining order was extended 10 days to permit an application for stay to the Ninth Circuit.

The Army then re-ordered Lt. Strait to report for active duty on August 17, 1970, and Lt. Strait filed an application for a stay of those orders with the court of appeals, but the court declined to enjoin his activation in an order entered on August 14, 1970, a Friday, at 4:45 P.M. Lt. Strait then presented an application to Mr. Justice Douglas at Goose Prairie, Washington, on August 16, 1970, which the Justice granted.

Finally, there is still uncertainty about the jurisdiction of a district court where the petitioner is not present and has never been physically located. This Court has still not resolved the habeas corpus subject matter jurisdictional question that arises when the petitioner is not physically present in the district where his custodian is located. *Nelson* v. *George,* 399 U.S. 224, 228, n. 5 (1970); *Ahrens* v. *Clark,* 335 U.S. 188 (1948).[16] At least one district court has concluded that *no district* in the United States has habeas corpus jurisdiction over non-unit reservists who re-

[16] The *Ahrens* court was concerned not with the absence of a custodian but the absence of the petitioner from the district. See pp. 25-26 *supra.* Lt. Strait has not had any physical contact with Indiana; hence, it is not certain he could file a petition there. Moreover, the *Ahrens* majority held that the lack of jurisdiction caused by the petitioner's absence was not waivable by respondents, 335 U.S. at 193; hence, any offer made herein by the Army not to raise jurisdictional objections in the district where the Reserve Center is located is illusory.

side outside the district of their service's record center. *Still* v. *Commanding Officer*, —— F. Supp. ——, 4 SSLR 3785 (N.D. Ala. No. 71-616, 11-19-71). The only way Lt. Strait could be at all certain that jurisdiction would exist would be to move to that district and assume a domicile there, a possibility the court in *Still* properly characterized as "bizarre."

Thus, it can be seen that neither alternative suggested is wholly acceptable or adequate to non-unit reservists.[17]

B. *The Result Urged by the Petitioner Will Cause No Hardship to Military Services.*

None of the problems enumerated above would be offset by benefits to the services. In *Schlanger* the government urged a literal reading of the jurisdictional provisions of 28 U.S.C. §2241 in order 1) to prevent "forum shopping" and 2) to avoid excessive disruption of the military, both of which it suggested would flow from a more flexible rule (Brief of Respondents 13). To whatever extent their arguments may have had validity in the unique factual setting of the *Schlanger* case, they have no application whatsoever in the context of this case and others involving non-unit, delayed active duty reservists.

1. Forum Shopping Can Be Prevented.

There has never been, nor can there be, any suggestion in this case that Lt. Strait was shopping for a forum. Never-

[17] The reserve center alternative also would result in cases being concentrated in the three districts where Reserve Centers are located. Congress has repeatedly enacted corrective legislation to avoid this result in habeas corpus cases, see 28 U.S.C. §§2241(d) and 2255, as well as in other areas of the law, see 28 U.S.C. §1361. Requiring reservists like the petitioner to litigate in these three districts would frustrate those legislative purposes.

theless, the issue of "forum shopping" so pervades questions of federal court jurisdiction that it cannot be completely ignored. The possibility of "forum shopping" arises whenever jurisdiction over a particular cause of action lies in more than one district. Congress has adequately equipped the lower courts with the tools needed to resolve the problems posed. While there may be some novelty to considering this proposition in the habeas corpus context, the lower federal courts have come to recognize it as inevitable in light of the evolving concept of custody. See *United States ex rel. Meadows* v. *New York, supra; Word* v. *North Carolina, supra.* Accordingly when faced with venue problems posed by new classes of petitioners, they have applied traditional venue concepts to deal with those issues. See, e.g., *United States ex rel. Meadows* v. *New York, supra* at pp. 1180-83.[18]

Even if venue criteria are met, the district court still has discretion to prevent "forum shopping" under 28 U.S.C. Section 1404(a) whereby the court may transfer any civil action to a more convenient forum. Of course no transfer motion was made below, before or after the district court held that it had jurisdiction.[19] Indeed, the respondents pre-

[18] In the context of this case, the parties must meet certain specific venue criteria set forth in 28 U.S.C. Section 1391: either, one of the parties must reside in the district, 28 U.S.C. Section 1391(e)(1) and (4), or the cause of action must have arisen there, 1391(e)(2). Thus, even when the serviceman is physically present in the district, the court may find he does not "reside" there by considering such factors as length and permanency of residence, extent of contacts with the district, and maintenance of another domicile, J. W. Moore, *Federal Practice,* para. 0.142 [5.-2], p. 1483-4, n. 5 (2d Ed. 1964). See, e.g., *McKay* v. *Secretary of the Air Force,* 306 F. Supp. 1252 (D. Mass. 1969) (a *venue, not a jurisdictional,* holding).

[19] Such a motion would probably have been denied on the merits because petitioner had substantial contacts with the district, most

sented their case effectively and without difficulty, as is usual.

"Forum shopping" should therefore properly be dealt with through the venue and transfer statutes provided for that purpose, rather than through inflexible and artificial jurisdictional decisions which unnecessarily defeat Congressionally intended ease of remedy. And the venue considerations should be the same whether the action is brought as a habeas corpus application, see Point I, *supra*, or pursuant to mandamus or other jurisdictional bases, see Points III to V, *infra*.

2. No Interference With Military Operations Will Result.

The suggestion that a flexible jurisdictional rule would result in undue interference with military operations—a dubious proposition in the first place—has no application to non-unit reservists. An unattached reservist, such as Lt. Strait, is only nominally part of the military. Until he reports for active duty he is performing no function as part of the service; unlike a unit-assigned reservist, he is not even part of a "paper" organization. Moreover, upon reporting for active duty he will have to undergo training before he is even useful to the service.

Hence any delay of active service in such cases can cause only minimal disruption, if any at all, with ongoing military operations. In many cases delays will be non-existent

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of the relevant administrative proceedings took place there, and respondents had been content previously to communicate by mail with the petitioner at his home in the district. Furthermore, "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil* v. *Gilbert*, 330 U.S. 501, 508 (1947).

or extremely brief. Some cases will be so devoid of merit as either not to warrant interlocutory relief, and/or to be amenable to summary disposition. Most cases will involve only questions of law, and the expeditious habeas corpus procedures should enable courts to dispose of them quickly. Only in cases of great merit or considerable complexity will there be longer delays, but that hardly seems to be unwarranted.

In fact many, if not most, of the delays complained of are self-inflicted by the military services in their zeal to raise jurisdictional defenses whenever possible,[20] often resulting in bifurcated trials and separate appeals, as here. If the services have an honest quarrel with the forum, they should move for transfer under 28 U.S.C. §1404. Failing that it would then seem to be in their interest to waive personal jurisdiction objections in order to obtain an expeditious ruling on the merits.

This case is a perfect example of such self-inflicted delay. Lt. Strait filed his petition on April 10 and from then until June 26 the court was diverted to a consideration of the respondents' jurisdictional objection. Once respondents answered on the merits on July 22, the court quickly disposed of the merits with a ruling filed on July 28 (A. 2). As the Second Circuit perceptively observed in *Arlen* v. *Laird, supra,* the government has demonstrated its lack of genuine interest in having these cases tried in any par-

[20] The history of in-service discharge cases has been one of extensive litigation over jurisdictional issues. See, Hansen, *Jurisdictional Bases of Federal Court Review of Denials of Administrative Discharges from the Military I,* 3 SSLR 4001, 4002 (1971).

ticular forum; in reality its only interest appears to be to cause maximum inconvenience for petitioners.

Finally, the government often magnifies the problems of restraining orders or orders requiring the subsequent return of petitioners to court, and underestimates the sensitivity of the courts to military exigencies. Few cases require the actual presence of petitioner, for they are tried on the administrative record. See, *Silberberg* v. *Willis*, 420 F.2d 662, 665 (1st Cir. 1970). Specifically, 28 U.S.C. §2243 waives that requirement where, as here, only issues of law are involved. Furthermore, as the Ninth Circuit recently noted, the district courts may be less inclined to grant interlocutory stays of deployment if they can be certain that the subsequent removal of the petitioner from the district will not cause them to lose jurisdiction. *Smith* v. *Campbell*, —— F.2d ——, —— 4 SSLR 3652, 3654 (9th Cir. 1971).

The necessity of interlocutory relief must first be determined by the district court after weighing such factors as the merits of the claim and the harm to be suffered by the granting or denying of interlocutory relief. If the court finds the claim insubstantial and/or the loss of the individual's services critical to the military, it may well deny temporary relief, but if the reverse is true, an order maintaining the *status quo ante* is equally appropriate. If the court ultimately rules that the individual should have been discharged, the military can hardly complain of having been deprived of his services *pendente lite*. Moreover, the services may ultimately lose more by requiring reservists to report for active duty *pendente lite*, since they will have to pay to the individual his travel, salary, and living expenses and bear the cost of training him, all of which will be lost if he is ordered discharged by the courts. This in

effect defeats the purposes of the services' own regulations which, recognizing the validity of claims of conscientious objectors, permit their separation from the military.[21]

C. *Conclusion.*

The ultimate question is whether the services' concerns are best dealt with by creating a jurisdictional rule that is inflexible and highly artificial, or whether these matters should be left to the wise discretion of the lower courts to be resolved traditionally as matters involving venue, *forum non conveniens,* and injunctive relief. The petitioner submits that the latter approach is not only preferable, but is mandated by Congressional policy.

III.

Mandamus jurisdiction is available to review the military's denial of conscientious objector discharge applications.

Lt. Strait also pleaded jurisdiction pursuant to 28 U.S.C. §§1361 and 1391(e), both for the purpose of reviewing the ultimate decision on the merits (which he alleged was contrary to the regulatory criteria and without basis in fact)

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[21] Curiously, the military will suffer more disruption in the cases of servicemen, whether active or reserve, who, under the government's theory, are permitted to bring court actions in the district where they reside merely because their departing unit is also located there. See e.g., *Feliciano* v. *Laird,* 426 F.2d 424 (2d Cir. 1970); *Carney* v. *Laird,* 326 F. Supp. 741 (D. R.I. 1971); *Laxer* v. *Cushman,* 300 F. Supp. 920 (D. Mass. 1969); and *Silberberg* v. *Willis,* 306 F. Supp. 1013 (D. Mass. 1969), *reversed on other grounds,* 420 F.2d 662 (1st Cir. 1970). Nevertheless, respondents appear to accept a jurisdictional rule that permits this amount of disruption, but to oppose an interpretation that will permit some non-unit reservists to enjoy the same standing (Resp. to Pet. for Cert. 5, nn. 1 & 2), with less apparent disruption.

and for the purpose of reviewing his allegations that his application was processed in a manner contrary to regulations. The court of appeals implicitly rejected the first basis of jurisdiction, apparently in reliance on *Jarrett* v. *Resor*, 426 F.2d 213 (9th Cir. 1970). It conceded that limited mandamus jurisdiction existed to review the procedural irregularities,[22] *Feliciano* v. *Laird*, 426 F.2d 424 (2d Cir. 1970); *Schatten* v. *United States*, 419 F.2d 187 (6th Cir. 1969), but it held that the exercise of that jurisdiction was not appropriate in this case (A. 64). The court of appeals fashioned novel rules of law regarding mandamus jurisdiction under 28 U.S.C. §1361 that have no support in authority and which severely undermine the intent of Congress. See generally, 3 K. DAVIS, *Administrative Law Treatise*, §§23.09-.12, pp. 334-362 (1958). Furthermore, even its application of its own newly adopted rules was incorrect in the case at hand.

A. *The Ninth Circuit's View of the Scope of Review Under §1361 Is Erroneous.*

The court of appeals stated, without amplification, that the district court could not have granted complete relief to Lt. Strait pursuant to its mandamus jurisdiction (A. 73). This assumption apparently derives from the Ninth Circuit's earlier ruling in *Jarrett* v. *Resor*, 426 F.2d 213, *supra*, that 28 U.S.C. §1361 is not available to test on the merits a denial by the military of a request for conscientious objector discharge. The Ninth Circuit's view of the scope of mandamus jurisdiction rests on a dubious reading of Con-

[22] In its February 17 opinion, the Court of Appeals apparently agreed that there had been procedural irregularities (A. 66), but found it unnecessary to reach those issues because of the conclusion that on the existing record the ultimate decision of the Army was without a "basis in fact."

gressional policy and is in conflict with decisions in other circuits. See, e.g., *Bluth* v. *Laird*, 435 F.2d 1065 (4th Cir. 1970); *Peoples* v. *U. S. Dept. of Agriculture*, 427 F.2d 561 (D.C. Cir. 1970); *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1968); *Ashe* v. *McNamara*, 355 F.2d 277 (1st Cir. 1965); *Still* v. *Commanding Officer*, —— F. Supp. ——, 4 SSLR 3785 (N.D. Ala. 1971); *United States ex rel. Clements* v. *Laird*, 3 SSLR 3863 (D. Md. 1971); *United States ex rel. Olsen* v. *Laird*, 3 SSLR 3774 (M.D. N.C. 1970).

In the Mandamus and Venue Act of 1962, 28 U.S.C. §§1361 and 1391(e), Congress greatly expanded the power of the federal district courts to review claims by individuals that officials or agencies of the government had violated their legal rights by failing to act in accordance with prescribed law. Some commentators have argued that Congress intended to expand the scope of judicial review of federal agency actions. *E.g.*, Byse and Fiocca, *"Section 1361 of the Mandamus and Venue Act of 1962 and 'Nonstatutory' Judicial Review of Federal Administrative Action,"* 81 HARV. L. REV. 308 (1967). Likewise in *Peoples* v. *U. S. Dept. of Agriculture*, the District of Columbia Circuit said:

> "This statute fills a void, which previously had been taken to prevent District Courts outside the District of Columbia from issuing mandamus against a government official. While the statute is couched in terms of mandamus action, its liberalizing purpose, to remove technical objection that exists outside the District of Columbia, was intended to permit District Courts generally to issue appropriate corrective orders where Federal officials are not acting within the

zone of their permissible discretion but are abusing or otherwise acting contrary to law. . . ." 427 F.2d at 565.

There can be no question that Congress intended to make it easier and more convenient for citizens to challenge alleged illegal government actions in the courts, as well as to ease the burden on certain districts where certain classes of cases could exclusively be maintained theretofore. Senate Report No. 1992, accompanying H.R. 1960, 1962 U.S. Code Cong. and Adm. News 2785. Nor can there be any question that the result below defeats both purposes of Congress, since it makes it harder for a citizen like Lt. Strait to sue the Army by requiring him to initiate action in a distant state, while at the same time concentrating these cases in the three districts where military administrative centers are located.

Although Congress intended that §1361 would not permit the district courts to interfere with decisions ordinarily entrusted to agency discretion, Senate Report 1992, *supra* at 2787, we do not have such a decision here. It is well settled that "discretionary" actions comprise a narrow and exceptional category of agency decision. *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 410 (1971), which are "political in nature," *Marbury* v. *Madison,* 1 Cranch (5 U.S.) 137, 170 (1803), and in which there is no law limiting the decision-maker's choices, L. JAFFE, *Judicial Control of Administrative Action* 181 (1965),[28] so that

[28] In *Ramos* v. *County of Madera,* 4 Cal. 3rd 685, 693, 484 P.2d 93, 98-9 (1971), the California Supreme Court adopted a useful definition of "discretionary" actions, as follows:

"Discretionary activity . . . is that related to basic policy decisions, or that activity sometimes characterized as the

the courts cannot determine whether the action under review was legally taken.

Although the Secretary of Defense may have had discretion in deciding whether or not to recognize claims of in-service conscientious objectors, he exercised that discretion when he promulgated D.O.D. Dir. 1300.6 which provides that conscientious objectors shall be discharged if they meet certain criteria.[24] The services thus no longer have discretion, as a matter of policy, to grant or deny such requests for discharge; the choices are limited by the regulatory criteria and the body of decisional law interpreting those criteria. Hence the services are limited to determining whether the criteria have been met and, if they have, to grant the relief decreed by regulation.

The Ninth Circuit succinctly summarized this concept in *Ferry* v. *Udall,* 336 F.2d 706, 713 (9th Cir. 1964), as follows:

> "The discretion of the Secretary is limited to deciding whether these requirements have been met. Judicial review . . . is available, since it would be anomalous to allow [an applicant] to lose rights, the conferring of which is made mandatory by the applicable statute, merely because . . . the Department . . . made erroneous or arbitrary decisions. . . ."

'planning' as opposed to the 'operational' level of decision-making."

Similarly see, *Gonzalez* v. *Freeman,* 334 F.2d 570, 575 (D.C. Cir. 1964) [Burger, Circuit Judge].

[24] D.O.D. Dir. 1300.6, para. IV A provides that discharges shall be granted to the extent practical. This portion of the directive does vest the services with discretion, but it has never been relied upon as grounds for denying a discharge, see *Hammond* v. *Lenfest,* 398 F.2d 705, 715-6, *supra; Crane* v. *Hedrick,* 284 F. Supp. 250, 254-5 (N.D. Cal. 1968), nor was there such a finding in this case.

This formula is, of course, a reiteration of the basic formula for mandamus expressed nearly a half century ago by Chief Justice Taft in *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 177-8 (1925). See also, *Roberts* v. *United States*, 176 U.S. 221 (1900). Once Congress by statute, or the agency by rule, establishes rules to be followed, any agency action thereunder is reviewable by mandamus if it has clearly failed to follow the established criteria. *McKay* v. *Wahlenmaier*, 226 F.2d 35, 47 (D.C. Cir. 1955); *Carey* v. *Local Board No. 2*, 297 F. Supp. 252 (D. Conn.), *aff'd*, 412 F.2d 71 (2d Cir. 1969).

The failure of an agency to correctly apply the statutory or regulatory criteria as an object of mandamus relief has been eloquently urged by Prof. Jaffe, as follows:

> "Before a court can decide that an official 'has discretion' whether or not or how to act, it must decide what relevant discretion has been granted. This decision will rest on an interpretation or construction of the statute conferring the power. Under our constitutions and our common law the courts have the power to determine the legality of administrative action. This is the power to decide the rule of law which defines the granted area of discretion.
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> • • • • •
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> "In short the officer may have discretion, not only to find the facts, but to choose the law. This means that he may make a choice which the court might not itself have made as an original proposition. But if a court is convinced that the rule chosen by the officer is clearly contrary (in its opinion) to the statutory purpose, then it will order the officer to act according to its view of

> the law; it will not and should not desist merely because in a general sense the officer has discretion. He has exercised his discretion contrary to law and in this sense he has violated a clear duty." JAFFE, *supra* at 181-2 and 183-4.

Therefore mandamus is available to review in-service denials of requests for discharge, especially if the courts are going to insist on applying the "basis in fact" test in such cases. When the agency decision is tested under the basis in fact standard of review the possible infringement upon agency discretion becomes nil. *Still* v. *Commanding Officer,* —— F. Supp. ——, 4 SSLR 3785 (N.D. Ala. 1971). In other words, if there is "no basis in fact" for the denial of the claim, then it can be said that the agency failed to perform a clear duty that it owed to Lt. Strait, *i.e.,* to base its decision on legal criteria and to act lawfully itself. Cf., *Estep* v. *United States,* 327 U.S. 114 (1946);[25] see also, JAFFE, *supra* at 366-7 and 374; and Van Alstyne, *Governmental Tort Liability: A Decade of Change,* 1966 U. ILL. L.F. 919, 975. In this regard, the courts will be doing what they traditionally do when they review agency actions pursuant to their mandamus jurisdiction—determining whether or not the agency followed the law.

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[25] In *Estep,* the Court ruled that a draft board which denies a requested classification in the absence of any "basis in fact" acts "lawless[ly] and beyond its jurisdiction." 327 U.S. at 121. The same rule would apply against respondents here, as the standards in conscientious objector cases are the same as between the Selective Service System and the military. *Gillette* v. *United States,* 401 U.S. 437 (1971).

B. *The Court of Appeals Improperly Confused Judicial Mandamus With Administrative Mandamus.*

The court below held that "[m]andamus is an extraordinary remedy which is to be utilized only in the most urgent cases," paraphrasing *Ex Parte Collett*, 337 U.S. 55, 72 (1949). The precise language in the cited case is as follows: "Mandamus prohibition and injunction *against judges* are drastic and extraordinary remedies. . . ." [Emphasis added.] *Cmax Inc.* v. *Hall*, 300 F.2d 265 (9th Cir. 1962), and *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d 949 (9th Cir. 1968), also cited by the court, are likewise cases involving mandamus against judges. Careful analysis of the cases cited by the court of appeals reveals that there is a critical distinction between judicial mandamus and administrative mandamus. Only mandamus against judges truly lies within the "sound discretion" of the courts. *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d at 952-3, *supra*.

1. Failure to Exercise Discretion.

Even assuming *arguendo* that the stricter requirements of judicial mandamus can appropriately be applied here, and that mandamus will issue only in the court's "sound discretion," but see Point III A *supra*, the court below nevertheless failed even to exercise that limited discretion (or more properly, to remand the proceedings to the district court for its exercise of discretion). In the cases cited by the court, the factors to be weighed in the exercise of sound discretion included the relative harm to be suffered by the parties, the possibility of duplicative litigation, and the possibility of irreparable injury and miscarriage of justice. *Pacific Car and Foundry Co.* v. *Pence*, 403 F.2d

949 (9th Cir. 1968); *Cmax Inc.* v. *Hall*, 300 F.2d 265 (9th Cir. 1962).

All of these criteria can be found in this case, indicating that "extraordinary" relief should be granted.

1. If no jurisdiction exists where the Reserve Center is located, Lt. Strait faces the irreparable injury of either reporting for military duty contrary to his belief of conscience or subjecting himself to the harsh, military penal domain.

2. Lt. Strait has already litigated this case at great expense both at the district court and court of appeals level and both courts have rendered decisions on the merits. To require him to start again from scratch in another district is most certainly a waste of judicial resources and an overbearing imposition on the litigants to the action.

3. In two thoughtful and thorough opinions, a three-judge panel of the court of appeals unanimously found there was no basis in fact for the Army's decision. Under the present opinion Lt. Strait must now subject himself to determination anew by a single district judge who may see matters from a different perspective and rule in an opposite manner. This would certainly be a miscarriage of justice.

4. Respondents could have sought a change of venue if they were inconvenienced, as the court below noted (A. 56, n. 7). Moreover, their adherence to the waivable personal jurisdiction objection on rehearing herein and their suggestion that either Indiana or Georgia would be suitable reveals them to be the real "forum shoppers" in these cases. *Arlen* v. *Laird*, —— F.2d —— (2d Cir. 1971).

5. Finally the hardship on Lt. Strait in the context of this case warrants resort to extraordinary remedies.

Thus, the court's reference to the principles of judicial mandamus and its application of those principles were both grossly in error.

2. Administrative Mandamus Not Discretionary.

The court was also in error in its view that mandamus jurisdiction over administrative action is discretionary. Administrative mandamus against federal agencies or officials under 28 U.S.C. §1361 is not committed to judicial discretion. Once the court determines that 1) there is a clear showing of erroneous official action and 2) that administrative remedies have been exhausted, then 3) the court can only refuse to grant relief if it finds that another adequate remedy at law exists.[26] *Hancock* v. *Laird*, 415 F.2d 234, 236 (9th Cir. 1969); *Carter* v. *Seamans*, 411 F.2d 767, 773 (5th Cir. 1969).

Here the Army had a clear, non-discretionary duty 1) to process Lt. Strait's application in accordance with its own regulations and 2) to base its ultimate decision on legal grounds, as determined by the record. *United States ex rel. Donham* v. *Resor*, 436 F.2d 751 (2d Cir. 1971). Its failure to do either in this case constitutes a clear showing of erroneous official action which is amenable to judicial relief in the nature of mandamus. 28 U.S.C. §1361. Furthermore, since Lt. Strait did not have another adequate remedy at

[26] *Whitehouse* v. *Ill. Cent. R. Co.*, 349 U.S. 366 (1955), cited by the court below is not to the contrary and is inapposite as well. The Court there was concerned with the irreparable harm criteria associated with injunctive relief, and moreover, it was unable to find a clear showing of erroneous official action inasmuch as administrative remedies had not been exhausted. Here administrative remedies have been exhausted and the threat of irreparable harm is clear.

law, the court had no discretion to refuse to exercise its mandamus jurisdiction.

C. *The Existence of Possible Habeas Corpus Jurisdiction in a Distant District Is Not Another Adequate Remedy at Law.*

While it is true that under certain limited circumstances, a court may decline to exercise mandamus jurisdiction, if it finds that another adequate remedy exists, *Carter* v. *Seamans*, 411 F.2d 767 (5th Cir. 1969), that doctrine carries its own limitations. Those limitations go to the question of whether the other remedy is really "adequate."

The court below improperly applied a gross generalization to the case at bar. A careful analysis of the doctrine that mandamus will not lie if another remedy exists reveals that the other remedy referred to has always been a statutorily created remedy at law. *Carter* v. *Seamans*, 411 F.2d 767, 771-2 and 774, *supra; United States ex rel. Girard Co.* v. *Helvering*, 301 U.S. 540, 544 (1937); L. JAFFE, *Judicial Control of Administrative Action* 177 (1965). Mandamus has never been foreclosed where only another extraordinary, non-statutory remedy existed. Rather the two remedies of mandamus and habeas corpus have been considered equally available. *United States ex rel. Schonbrun* v. *Commanding Officer*, 403 F.2d 371 (2d Cir. 1968); *United States ex rel. Clements* v. *Laird*, 3 SSLR 3863 (D. Md. 1971); *United States ex rel. Olsen* v. *Laird*, 3 SSLR 3774 (M.D. N.C. 1970). Indeed, under the Ninth Circuit's reasoning, even a common law mandamus action in the District of Columbia might be considered an adequate alternative remedy barring Section 1361 relief, a result in contravention of the statutory intent.

Moreover, for reasons discussed earlier, it can hardly be argued that the possible availability of habeas corpus in a

distant state, both generally and under the circumstances of this case, constitutes an effective alternative remedy which should bar the exercise of mandamus jurisdiction which otherwise concededly exists.[27] See, *Still* v. *Commanding Officer*, —— F. Supp. ——, 4 SSLR 3785 (N.D. Ala. 1971) (holding that mandamus jurisdiction exists in these reservist cases).

The court below has defeated the purposes underlying both the Great Writ and the Congressional intent expressed in 28 U.S.C. §1361. The District of Columbia Circuit noted that one of the purposes behind the enactment of §1361 was to alleviate "an absurd situation in which litigants with just claims against the federal government were compelled to travel long distances at considerable expense in order to prosecute their causes of action." *McKenna* v. *Udall*, 418 F.2d 1171, 1173 (D.C. Cir. 1969). Nevertheless, the Ninth Circuit has forced Lt. Strait into precisely such an "absurd situation" by finding the very statute designed to alleviate such results unavailable to him. Such a result is untenable.

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[27] The court of appeals apparently agreed that Lt. Strait's allegations of procedural irregularities could be reached via mandamus but felt that the court could not grant "complete relief" (A. 64). The court apparently did not consider the possibility that the court's pendent jurisdiction could be invoked to dispose of the case as justice required. See, *Romero* v. *Int'l Terminal Operating Corp.*, 358 U.S. 354 (1959); J. HANSEN, *The Jurisdictional Bases of Federal Court Review of Administrative Discharges from the Military II*, 4 SSLR 4001, 4005 (1971). An assumption of pendent jurisdiction in this case would have been most just and appropriate, especially after both the district court and court of appeals had considered and rendered decisions on the merits of the claim.

IV.

Judicial review is available pursuant to 5 U.S.C. §701, et seq. of the Administrative Procedure Act.

Like 28 U.S.C. §1361, the judicial review provisions of the Administrative Procedure Act (hereinafter A.P.A.), 5 U.S.C. §§701-4 create "nonstatutory" jurisdiction in the district courts to review federal agency actions. Although the two provisions achieve a similar result, there are subtle differences; the A.P.A. being broader in scope as regards the standard of review and form of relief that can be fashioned. 5 U.S.C. §703; cf. also, *Peoples* v. *U. S. Dept. of Agriculture*, 427 F.2d 561 (D.C. Cir. 1970).

Respondents here erroneously contend that A.P.A. jurisdiction is not available (Brief in Opposition to Pet. for Cert. 8). Their argument apparently derives from a misconstruction of those provisions of the A.P.A. which require resort to other statutorily created remedies, *e.g.*, 5 U.S.C. §§703-4. We are here concerned with an inherently "nonstatutory" form of review. This Court long ago made it abundantly clear that the A.P.A., in combination with the Declaratory Judgment Act, 28 U.S.C. 2201-2, may be used as an alternative to habeas corpus, even when the latter remedy is unquestionably available and the more traditional mode of review. *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956); *Shaughnessy* v. *Pedreiro*, 349 U.S. 48 (1955).

In *Tom We Shung* this Court said:

> "We conclude that . . . exclusion orders may be challenged by habeas corpus or by declaratory judgment action." 352 U.S. 184.

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> "It may be that habeas corpus is a far more expeditious remedy . . . [b]ut that fact may be weighed by the alien against the necessity of arrest and detention after which he may make his choice of the form of action he wishes to use. . . ." *Id.* at 186.

The obvious thrust of *Tom We Shung* and *Pedreiro* was their emphasis on the adequacy of the alternate remedy, and the conclusion that whether the alternative is adequate is a decision primarily for the petitioner to make whenever there are hardship factors associated with one of the remedies. (See discussion *supra* at p. 61.) In other words, the petitioner may choose to avoid those hardships by seeking a declaratory judgment pursuant to the A.P.A. This approach has been applied in at least one reported in-service conscientious objector case. *Berman* v. *Resor*, 302 F. Supp. 1200 (N.D. Cal. 1969); see also, *Robbins* v. *Reed*, 269 F.2d 242 (D.C. Cir. 1959) (prisoner allowed to use A.P.A. as alternative to habeas corpus to avoid harsh rule in the Circuit where he was incarcerated). This position is also supported by one of the leading scholars on judicial review of administrative action, Prof. Louis Jaffe, who has said that one function of the A.P.A. is " . . . to provide an additional, more flexible remedy. . . ." JAFFE, *Judicial Control of Administrative Action*, 372-4 (1965).

Respondents may also contend that the A.P.A. is not a jurisdictional statute, and/or that the action of the Army herein is excluded from its purview because it is discretionary in nature.[28] These contentions were conclusively disposed of in *Citizens to Preserve Overton Park* v. *Volpe*,

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[28] Certain military decision-making processes are also specifically excluded from the Act, but none of these exclusions is applicable here. 5 U.S.C. §§701(1)(F) and (G).

401 U.S. 402, 410 (1971). See also discussion at pp. 54-56, *supra*.

Consequently, the district court also had jurisdiction pursuant to the A.P.A. Despite the fact that such a jurisdictional basis existed and was pleaded, despite the fact that substantial authority exists supporting the petitioner's position, and despite the fact that the government never raised any significant argument in opposition thereto, both the district court and the court of appeals ignored these allegations. Lt. Strait firmly believes that had they not done so, they would have been compelled to conclude that jurisdiction existed.

V.

Federal question jurisdiction also exists pursuant to 28 U.S.C. §1331.

28 U.S.C. §1331 grants jurisdiction to the district courts to hear and determine cases involving questions of federal law. The statute thus grants the district courts jurisdiction to review federal agency determinations. Only two criteria exist for pleading a non-diversity case under 28 U.S.C. §1331:

> "(1) [T]hat the required jurisdictional amount is present and (2) . . . that the complaint . . . presents a substantial federal question." 6A Moore, *Federal Practice*, para. 57.23, p. 3136 (1966).

Consequently section 1331 has been extensively used as the jurisdictional basis for suits challenging decisions of the Selective Service System prior to induction. See, *Breen* v. *Selective Service Board No. 16*, 396 U.S. 460 (1970);

Oestereich v. *Selective Service System Local Board No. 11,* 393 U.S. 233 (1968); *Fein* v. *Selective Service System,* 430 F.2d 376 (2d Cir. 1970), *cert. granted,* 401 U.S. 953 (1971); *Wolff* v. *Selective Service Board No. 16,* 372 F.2d 817 (2d Cir. 1967); *cf.* also, *Berk* v. *Laird,* 429 F.2d 302 (2d Cir. 1970). This challenge to a highly analogous administrative decision of the Army, brought by a reservist about to be activated, creates a remarkably similar jurisdictional framework.

The only remaining issue is the question of jurisdictional amount. Many appellate courts have adroitly sidestepped the issue and have proceeded to the merits. E.g., *Breen* v. *Selective Service Local Board No. 16,* 406 F.2d 636, 637, n. 1 (2d Cir. 1969), *reversed on other grounds,* 396 U.S. 460 (1970). Petitioner submits that the proper rule was articulated by Judge Edelstein in *Boyd* v. *Clark,* 287 F. Supp. 561, 568 (S.D.N.Y. 1968), *aff'd without reaching the jurisdictional amount question,* 393 U.S. 316 (1969), namely, that freedom from interference with personal liberty as a result of an arbitrary governmental action "is inherently worth more than $10,000." Accord: *Cortright* v. *Resor,* 325 F. Supp. 797 (E.D.N.Y. 1971), *reversed on other grounds,* 447 F.2d 245 (2d Cir. 1971).

More importantly, however, Lt. Strait pleaded the existence of an amount in controversy exceeding $10,000, and that allegation has never been contested. He also stands ready to prove the existence of potential damages in excess of $10,000 in the event the case should be remanded to the district court to proceed pursuant to 28 U.S.C. §1331. Cf. *Oestereich* v. *Selective Service System, supra; Berk* v. *Laird,* 429 F.2d 302, 306 (2d Cir. 1970).

VI.

Conclusion.

For the reasons stated, the judgment of the Court of Appeals should be reversed, and the case should be remanded with instructions to reinstate the judgment and opinion of February 17, 1971.

Respectfully submitted,

January 7, 1972

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* Attorneys for petitioner wish to express their appreciation to Edwin J. Oppenheimer, Director of the New York Civil Liberties Union Selective Service and Military Law Panel for his assistance in the preparation of this brief.

APPENDIX OF CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

CONSTITUTION OF THE UNITED STATES

Article I, Section 9

The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

5 United States Code §701 (Supp. V, 1965-70)

Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 United States Code §702 (Supp. V, 1965-70)

Right of Review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5 United States Code §703 (Supp. V, 1965-70)

Form and venue of proceeding.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5 United States Code §704 (Supp. V, 1965-70)

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. • • •

28 United States Code §1331(a) (1964)

Federal question; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

28 United States Code §1361 (1964)

Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or

employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 United States Code §1391(e) (1964)

A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law, be brought in any judicial district in which: (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

28 United States Code §2241(a) and (b) (1964)

Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

*AR 135-25

Headquarters
DEPARTMENT OF THE ARMY
Washington, D.C. *2 September 1970*

Army National Guard and Army Reserve

DISPOSITION OF CONSCIENTIOUS OBJECTORS

Effective 1 August 1970 in accordance with DA message RCPL 031400Z Aug 70

1. Purpose. This regulation prescribes policies, criteria, and procedures governing the disposition of Reserve members of the Army who claim to be conscientious objectors.

2. Applicability. a. This regulation applies to all Reserve members of the Army, except those specified in *b* below.

b. The provisions of AR 600-200, AR 614-106, and AR 635-20 govern the disposition of Reserve members of the Army who claim to be conscientious objectors and who are either—

(1) Serving in the active military service in their Reserve status; or

(2) Serving on initial active duty for training in their status as Reserves of the Army.

• • • • •

4. Policy. a. No vested right exists for an individual to be discharged at his own request by reason of conscientious objection prior to the expiration of his contractual or statutory obligation.

• • • • •

* This regulation supersedes AR 135-25, 17 June 1970, and DA message RCPL 031400Z Aug 70(U), subject: Interim Change to AR 135-25, 17 June 1970.

5. Eligibility for consideration. a. Consideration will be given to requests for discharge by reason of conscientious objection to participation in war, in any form, when such objection develops subsequent to the member's entry into military service, whether such entry was by induction, enlistment, or appointment in any component of the Army.

b. Federal courts have held that a claim to exemption from military service under Selective Service laws must be interposed prior to notice of induction, and failure to make timely claim for exemption constitutes waiver of the right to claim. However, claims based on conscientious objection growing out of experiences prior to entering military service, but which did not become fixed until entry into the service, will be considered.

c. Consideration will not be given to requests for discharge based solely on conscientious objection which—

(1) Existed but was not claimed prior to member's initial entry into military service either by induction or enlistment or appointment in any component of the Army; or

(2) Existed but was claimed and denied by Selective Service prior to member's induction into the active military service; or

(3) Based solely upon consideration of policy, pragmatism, or expediency; or

(4) Claims objection to a particular war.

6. Applications for discharge. Reserve personnel requesting discharge by reason of conscientious objection will submit such request in accordance with the following instructions:

• • • • •

(1) *Unit members.* ARGUS and USAR members assigned to units will submit their applications to the commanding officer of the unit to which assigned. Members of the inactive National Guard will submit their applications to commanding officer of the unit to which attached.

(2) *Nonunit members.* Ready Reserve nonunit members and Standby Reserve members will submit their applications to the oversea area commander; Commanding Officer, U.S. Army Reserve Components Personnel Center, Fort Benjamin Harrison, IN 46249; or the Commanding Officer, U.S. Army Administration Center, 9700 Page Boulevard, St. Louis, MO 63132, as appropriate.

7. *Procedures.* *a.* Commanders having custody of the member's records will take the actions preseribed below.

* * * * *

c. Area commanders will provide assistance upon request from the Commanding Officer, U.S. Army Reserve Components Personnel Center, or Commanding Officer, U.S. Army Administration Center, as appropriate, to arrange for necessary interviews of nonunit reservists residing in their geographical area of jurisdiction. Two copies of this regulation, application, and supporting papers will be furnished to the area commander for compliance with *b*(4) above. The Commanding Officer, U.S. Army Reserve Components Personnel Center, and Commanding Officer, U.S. Army Administration Center will be advised of the date, time, and facility where applicant should report for interview and are responsible for informing the applicant when and where to report for this purpose. Reports of interview

for nonunit reservists will be mailed direct to the Commanding Officer, U.S. Army Reserve Components Personnel Center, or Commanding Officer, U.S. Army Administration Center, as appropriate.

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e. The application for discharge, together with the inclosure(s), DD Form 1589, reports of interviews, and the officer's recommendation or waiver required by *b*(3) above will be forwarded in quadruplicate (original and three copies) in accordance with *f* or *g* below, whichever is appropriate. The members Military Personnel Records Jacket, U.S. Army (DA Form 201) will also be included.

(1) The immediate commander's comment will include the following information:

(*a*) Whether approval or disapproval is recommended and the reasons therefor.

• • • • •

g. Applications submitted by USAR personnel will be forwarded through military channels to the Commanding Officer, U.S. Army Reserve Components Personnel Center, ATTN: RCPA, Fort Benjamin Harrison, IN 46249.

h. The Commanding Officer, U.S. Army Reserve Components Personnel Center, will convene a board of officers to determine findings and submit recommendations on all applications for discharge submitted under this regulation. The board will follow the general procedures set forth in AR 15-6. The format of the board proceedings will be prescribed by the Commanding Officer, U.S. Army Reserve Components Personnel Center.

ARMY REGULATION
No. 15-6

HEADQUARTERS
DEPARTMENT OF THE ARMY

WASHINGTON, D.C., *12 August 1966*

BOARDS, COMMISSIONS, AND COMMITTEES

PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS CONDUCTING INVESTIGATIONS

1. *Scope.* Investigating officers and boards of officers (which may consist of only one officer) are appointed by superior authority, usually under an Army regulation pertaining specifically to the matter requiring investigation. Generally, this regulation is supplemental to such specific regulations and, in addition, will govern in the investigation of matters not covered in specific regulations (e.g., whenever an officer is appointed to investigate a complaint under UCMJ, Art. 138). In case of conflict between this regulation and a pertinent specific regulation, however, the latter will govern. This regulation is not applicable to investigation of court-martial charges. *See Uniform Code of Military Justice, Article 32, and Manual for Courts-Martial, United States, 1951,* chapter VII. The promulgation of this regulation shall not invalidate any investigation or proceeding initiated prior to the receipt of this regulation and conducted in conformity with the existing regulation.

2. *Function.* The primary purpose of any investigation, whether conducted by an investigating officer or by a board of officers, is to ascertain facts and to report them to the

appointing authority as the basis for some appropriate action by him. It is the duty of any investigating officer or board to make a complete and impartial presentation of the evidence on both sides, and to make such findings and recommendations as may be appropriate and warranted by the facts. No person shall attempt to coerce, or by unlawful means influence, the actions of an investigating officer or board of officers in any matter whatsoever or the action of any superior authority acting upon the matter. The appointing authority will take whatever action he deems necessary to correct errors or irregularities in the proceedings of an investigating officer or board of officers. However, errors or irregularities which do not adversely affect the substantial rights of the individual(s) concerned or of the Government will not be deemed to render invalid the proceedings, or any action of the appointing authority, based thereon.

14. *Prejudicial allegations.* When matters prejudicial to the conduct, status, efficiency, fitness, character, or rights of an individual arise and become an issue during the course of the investigation, the investigating officer or board shall make the individual concerned a party, and make known to him in writing, the precise nature of the prejudicial allegations. Additionally, he will be entitled to counsel as provided in paragraph 8, permitted to examine such allegations or evidence, and afforded an opportunity to answer such allegations by the testimony of any witness or witnesses he may desire heard in his own behalf, and by written statements, sworn to if practicable, of himself and others he may desire to submit. Failure to afford any of the above rights will be fully explained in the record of proceedings. If the person concerned is unavailable for good cause, such as absence from the command, the above

requirements may be met by furnishing him a copy of the record of proceedings together with advice as to his right to present evidence. Subject to the rights of a witness as set forth in paragraph 13, the individual concerned may be called by the investigating officer or board and required to testify under oath upon any point involved concerning which he might be a material witness.

17. *Written brief.* The individual concerned or his counsel may submit a written brief covering the whole or any portion or phase of the case under investigation and, except for good cause shown, a reasonable time will be afforded him in which to submit it. To assist in preparation of this brief, the individual concerned or his counsel will, upon request and subject to security requirements, be allowed to examine the report of proceedings prior to action by the convening authority.

20. *Evidentiary basis.* Each finding must be supported by substantial evidence, which is defined as such evidence as a reasonable mind can accept as adequate to support a conclusion.

25. *Copies of reports.* Except as prescribed in paragraphs 14, 15, and 17, an investigating officer or board of officers is not authorized to furnish reports of investigation or copies thereof to anyone other than the appointing authority or his duly designated representative. After deletion of classified portions, one copy shall be furnished to each individual concerned. The appointing authority may furnish reports of investigation or copies thereof to others whose official duties entitle them to such; otherwise, the furnishing of copies is governed by the provisions of AR 345-20 and other pertinent regulations.